Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RONALD LAMONT SELDON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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July 17, 2007

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Fourth Circuit erred in concluding that the Fourth Amendment is not implicated in a search and seizure of a vehicle by virtue of no government action, where the Court of Appeals expressly held that the Sheriff's deputy's telephone call was the "initiating" act for the subsequent search by the Maryland State Police officer?

II. Whether the District Court erred in concluding that the July, 2000, search of the vehicle was not impermissibly tainted by the earlier October, 1999, search of the same vehicle while in the custody of the car dealership, even though the limited purpose of bailment of the vehicle had already been achieved and the scope of the government agents' search was more intrusive than the search by the dealership's mechanics?

III. Whether the District Judge abused his discretion when he announced, on the record, that he was disinclined to apply the exclusionary rule based on his personal prejudice and being "tired of having to let people [go,]" on constitutional grounds?

PARTIES TO THE PROCEEDING

The case caption identifies all the parties to the proceeding appearing here and before the United States Court of Appeals for the Fourth Circuit, below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 479 F.3d 340 (4th Cir. 2007), and is reprinted in the Appendices to the Petition, at Appendix A (hereinafter, "Pet. App."). The District Court's bench opinion is unreported, but reprinted with the transcript excerpts of the proceedings below at Pet. App. 1a. In earlier State of Maryland proceedings, the Court of Special Appeals of Maryland reversed the Petitioner's State conviction. Its Opinion and Order in *Seldon v. Maryland*, 824 A.2d 999 (Md. Ct. Spec. App. 2003) is reprinted as well, at Pet. App. 82a.

JURISDICTION

The Court of Appeals entered its judgment after the Appellant's Petition for Rehearing on April 10, 2007, and subsequent mandate on April 18, 2007; this Honorable Court, therefore, has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2006). This Petition for a Writ of Certiorari, moreover, is timely filed, within ninety (90) days of the entry of the Court of Appeals' mandate.

STATUTES INVOLVED

This case involves provisions of the Controlled Substances Act, codified as amended at 21 U.S.C. § 846 (2006) and 18 U.S.C. § 1957(a) (2006). The pertinent provisions are reproduced in the Appendix at Pet. App. 111a.

STATEMENT OF THE CASE

A. Factual Background

On October 29th, 1999, Pohanka Mazda, an automobile dealership in Wicomico County contacted Detective Carson Wentland concerning "something unusual" in a 1998 Mazda MPV van. Detective Wentland, in turn, contacted Sergeant Michael Lewis of the Maryland State Police to notify him that the dealership had discovered "something suspicious." Pet. App. 28a. Both officers arrived at the dealership in the late afternoon. Pet. App. 74a.

The vehicle had been repaired and placed in a customer pick-up lot. *Id.* Sergeant Lewis spoke to the technician who worked on the vehicle, Mr. Bruce Willey. Sergeant Lewis directed Mr. Willey—the technician who had reported "something unusual" in the vehicle to his supervisor—to drive the vehicle into the service bay. Pet. App. 74a-75a. There, Sergeant Lewis and Detective Wentland conducted a warrantless search of the vehicle. Pet. App. 74a-76a. According to Mr. Willey, Sergeant Lewis pushed the front seat back, and removed the carpet. Pet. App. 74a-76a.

Sergeant Lewis observed two false compartments constructed either inside or next to the gasoline tank. Pet. App. 28a-30a. Sergeant Lewis inspected the vehicle by using a screwdriver, prying open one of the compartments and hooking up alligator clips in an attempt to operate the electrically-switched hydraulic compartment. Pet. App. 28a-30a. After his inspection, Sergeant Lewis recorded the vehicle's tag and VIN number. *Seldon v. United States*, 479 F.3d 340, 342 (4th Cir. 2007). Upon further inquiry by Sergeant Lewis, the dealership produced documents to confirm that Appellant Ronald Seldon had brought the vehicle in for repairs. *Id.* Sergeant Lewis learned Mr. Seldon's identity and that he was implicated in a drug investigation, for the first time at Pohanka Mazda on October 29, 1999. *Id.*

Approximately nine months later, on July 13, 2000, Mr. Seldon was operating the same 1998 Mazda MPV van eastbound on Route 50 near Annapolis. *Id.* According to Sergeant Lewis, he happened to—coincidentally—be traveling the same route on the same day at the same time. Sergeant Lewis paced Appellant's vehicle at 71 m.p.h. in a 55 m.p.h. zone and stopped Appellant for a speeding violation. *Id.* The traffic stop occurred at approximately 1:50 p.m.

Sergeant Lewis approached the passenger side of the vehicle. *Id.* While he waited for Mr. Seldon to produce his license and registration, Sergeant Lewis smelled air fresheners, observed several law enforcement decals on the vehicle's windshield, and a large wad of money being pulled from Appellant's pant pocket. When Mr. Seldon gave Sergeant Lewis his license, Sergeant Lewis immediately recognized Mr. Seldon—claiming that the recognition "hit" him forcefully—as the individual whose automobile he had previously searched while under repair at Pohanka Mazda the previous October. Pet. App. 28a-31a. Upon returning to his vehicle, Sergeant Lewis placed a call to verify the validity of Mr. Seldon's license. Pet. App. 31a.

After Maryland State Police dispatch confirmed that Mr. Seldon's license was valid, Sergeant Lewis placed a call to Sergeant Michael Kenhart of the Wicomico County Narcotics Task Force. Sergeant Lewis informed Sergeant Kenhart that he had stopped Mr. Seldon for a traffic violation but "he had enough to do him." Pet. App. 11a-14a. Sergeant Lewis requested back up and a canine unit, but the canine unit was not available. Upon returning to Mr. Seldon's Mazda MPV, Sergeant Lewis decided to search the vehicle. Pet. App. 12a-14a.

Sergeant Lewis asked Mr. Seldon to exit his vehicle and stand to the rear. Mr. Seldon cooperated, but refused to consent to a search. Sergeant Lewis repeatedly engaged Mr. Seldon in conversation claiming that he could smell the odor of cocaine emanating from the Mazda and that Mr. Seldon, during the course of this commentary, was nervous. Pet. App. 12a-16a. Mr. Seldon denied he was nervous and again refused to consent to the search. Pet. App. 15a-16a. When back up arrived, Sergeant Lewis used a crowbar to search the vehicle, including the compartments in the vehicle of which he had prior knowledge from the earlier, October, 1999, search while the vehicle was at Pohanka Mazda. Pet. App. 28a-31a. One compartment was empty but the second compartment contained cocaine and marijuana. Mr. Seldon was arrested, and subsequently charged by the State of Maryland with various violations of the controlled dangerous substance laws. *Seldon v. Maryland*, 824 A.2d 999 (Md. Ct. Spec. App. 2003).

Concurrently, federal authorities were undertaking their own investigation of Mr. Seldon's activities, issuing a sealed indictment on February 20, 2003. The activities included not only those out of which the State of Maryland drug distribution charges arose, but violations of various financial transaction and money-laundering statutes as well, to include other members of Mr. Seldon's family and other codefendants. *Seldon*, 479 F. 3d at 342. That investigation, however, came to full fruition and grew out of the information gleaned from

Mr. Seldon's July 13, 2000, arrest, detention, seizure of evidence, and State of Maryland prosecution, *see* Pet. App. 10a, one that was eventually overturned on appeal by the Maryland Court of Special Appeals in a written, reported opinion by The Honorable Joseph F. Murphy, Chief Judge. *Seldon*, 824 A.2d at 1016.

As the federal search and seizure warrant itself indicates, applied for by Special Agent David M. Riviello on the same day as Petitioner's arrest by Sergeant Lewis of the Maryland State Police, the Government systematically relied upon the information gathered, both in the illegal search of October 29, 1999 and the subsequent illegal search of July 13, 2000, Pet. App. 11a.

At the federal suppression hearing, held on November 24, 2003, the question of whether Sergeant Lewis could smell cocaine in Mr. Seldon's Mazda MPV while standing at the side of the road was extensively litigated, but the Court failed to make a specific factual finding one way or the other. 479 F. 3d at 342. Sergeant Lewis also testified under oath that the memory of the earlier search triggered his specific recollection of Mr. Seldon personally, knowledge he exploited to effect the latter search and arrest in July, 2000 from the moment he reviewed Mr. Seldon's license documents. Pet. App. 28a-29a.

B. Proceedings Below and in State Court

The instant petition for a writ of certiorari arises out of the Petitioner's conviction in the District of Maryland for conspiracy to distribute and possession with intent to distribute cocaine hydrochloride and cocaine base, in violation of 21 U.S.C. § 846 (2006), and conspiracy to engage in unlawful monetary transactions in violation of 18 U.S.C. § 1957 (a)(2006). At his June 8, 2004, trial and guilty plea, Petitioner preserved his right of appeal from the denial of his suppression motion, contending that the evidence used against

him was the derivative product of an illegal search and seizure. *Kaupp v. Texas*, 538 U.S. 626, 123 S. Ct. 1823, 155 L. Ed.2d 814 (2003); *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed.2d 441 (1963). Despite expressly finding that it was the telephone call of Deputy Wentland—a government agent—that had "initiated Lewis's involvement in this matter," the United States Court of Appeals for the Fourth Circuit nevertheless concluded that Sergeant Lewis had a "independent, untainted" basis for his latter search of the vehicle, which relied exclusively upon the reports of the service technician, Mr. Willey. 479 F. 3d at 341.

As indicated, in earlier State of Maryland proceedings brought on similar theories and the same facts as those at issue here, the Petitioner was convicted of possession with intent to distribute controlled, dangerous substances, specifically cocaine hydrochloride and marijuana. On appeal, Chief Judge Joseph Murphy, writing for the Court of Special Appeals of Maryland, vacated the Petitioner's conviction on the ground that the earlier search required government agents to procure a warrant, since there was no exigency, the limited purpose of the bailment had been achieved, and because there was no independent basis for the latter search: the factual findings at trial were that cocaine cut with caffeine had no discernable odor. The October, 1999, search had, therefore, impermissibly tainted the July, 2000, search. The State of Maryland petitioned the Court of Appeals of Maryland for a writ of certiorari, which denied further review. *Maryland v. Seldon*, 832 A.2d 206 (2003).

REASONS FOR GRANTING THE WRIT

SUMMARY

The instant petition for a writ of certiorari raises what would appear to be an important issue of first impression with respect to what constitutes "government action." Specifically, does a government agent's interpretation and recasting

of information provided by a private citizen, prior to communicating that information to a second government agent who subsequently takes action, constitute "government action?" More to the point, does not the mere act of exchanging information between respective police agencies, where both agents are acting under color of law, implicate "government action?"

In the instant case, a citizen reported what—ostensibly—was observation of "something unusual" in a vehicle to a government agent, Wicomico County Sheriff's Deputy Carson Wentland. Pet. App. 28a-29a. Deputy Wentland interpreted the reported information to subsequently reformulate it on the basis of his "training, knowledge and experience" as indicia of criminal activity or "something suspicious," conceding, however, that he had "no idea" what might be involved. Pet. App. 28a-29a. Subsequently, he iterated that interpretation of the citizen's report to a second government agent, Sergeant Michael Lewis of the Maryland State Police. Pet. App. at 28a-29a. After contact with Deputy Wentland, Sergeant Lewis then spoke with dealership employees and ordered them to make the vehicle available for a search. Pet. App. at 74a-75a.

Under the facts of the case as the United States Court of Appeals for the Fourth Circuit found them, the second government agent's involvement in the case—the agent who conducted the search—was initiated by virtue of his contact with the first government agent. *Seldon v. United States*, 479 F.3d at 344. In the interim, the citizen report of "something unusual" had already transmuted, in Deputy Wentland's mind, to "something suspicious." Pet. App. at 28a. Moreover, there is a clear point of temporal demarcation in the case at which the "private citizens" transmute into agents of the government after the arrival of Sergeant Lewis on the scene, complying with his directives.

As such, Sergeant Lewis could never have had an "independent source" of probable cause for the subsequent search

he performed in July, 2000: from his "initial" involvement in the case—Deputy Wentland's telephone call—the pervasive influence of government authority over the "private citizens" is written all over the case. Moreover, if the police are free to take citizen reports, recast and escalate them through their experiential bias, to turn every report of potentially innocuous "unusual" activity into "something suspicious" through nothing more than their investigative curiosity, none of which courts may attribute to police action, the potential for abuse is limitless. The police are thus free to use any citizen report, hyperbolically conflate that report to indicate any "suspicion" of criminal activity they can conjure, and proceed to initiate a warrantless search with the assurance their actions are effectively insulated from Fourth Amendment scrutiny.

It is well-settled that private citizens, acting in concert with the police or at the instigation of the police, are "government agents." *E.g.*, *Specht v. Jensen*, 832 F.2d 1516 (10th Cir. 1987). In this case, the District Judge arrived at his factual findings by actually discrediting the testimony of the private citizen, finding that an unknown "somebody" had made police aware of the "suspicious activity." Pet App. at 50a. The prosecutor herself, however, conceded on the record that the information provided by the private citizen in State of Maryland court proceedings, testimony to which the Government stipulated in the federal proceedings, was not itself indicative of "suspicious" activity, only "something unusual." Pet. App. at 74a-76a.

Second, the paucity of decisional law from this August Tribunal on the issue of search and seizure of bailed property raises a novel issue. The bailment in this case is distinct, as well: the Government sought authority from the Court of Appeals for the search, citing to *United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed.2d 85 (1984), in which a bailed freight tube carried by Federal Express broke open, revealing the presence of contraband: cocaine. In that

case, this Court authorized field testing of the cocaine by the government agents, on the basis that destruction of the minimal amount of cocaine served an important law enforcement interest, and the search by the government actors did not exceed the scope of the search and seizure effected by the private citizens. *Id.* In *Jacobsen*, the revealed material inherently suggested a criminal act, because the contents of the container were revealed. *Id.*

In *Seldon*, however, the private citizens only saw the exterior of the container, analogous to the exterior of the Fedex freight tube: it was the government agents who attempted to open the container. The scope of the government agents' actions here exceeded that of the private actors. And, in sum, no one witnessed evidence that inherently demonstrated the commission of a "criminal" act, something the district judge expressly recognized. Pet. App. 54a-56a.

Moreover, the district judge abused his discretion, when he declined to apply the law on the basis of personal prejudice and being tired of "letting people [go]" on the basis of Constitutional guarantees. Finally, the parallel, anomalous results in the federal and state court proceedings are noteworthy: this case, as good, reported law in each respective jurisdiction, stands for diametrically opposite propositions, each decided on the basis of supreme, federal case authority.

I. The Fourth Circuit erred in concluding that the search and seizure at issue was premised on no government action, and the decision below creates the potential for arbitrary police abuse of private citizen reports, insulating escalated or conflated police interpretations of private information from Fourth Amendment scrutiny.

In the instant case, there seems to be no reasonable dispute that Sergeant Lewis's involvement in the case was "initiated" by government action: the telephone call of Wicomico Sher-

iff's Deputy, Carson Wentland. The United States Court of Appeals for the Fourth Circuit (King, J.) held:

> And the evidence of record confirms the district court's finding in this regard. In *the telephone call that initiated Lewis's involvement in this matter, Deputy Wentland, of the Wicomico County Sheriff's Department, notified Lewis* that technicians at Pohanka had reported what was "*apparently* a false compartment" in a vehicle they were servicing.

Seldon v. United States, 497 F.3d 340, 344 (4th Cir. 2007).

Notwithstanding its express finding that Sergeant Lewis's involvement in the matter was the direct effect of another government agent's solicitation, the Fourth Circuit nevertheless concluded that Lewis's July, 2000, Annapolis search was premised on a basis independent of his October, 1999 search. How the Court concludes this is less clear: at the same time it concedes that Sergeant Lewis's *entire involvement* in the case is premised on the telephone call of a government agent—Deputy Wentland—who has already interpreted and rephrased the information, it wholesale discounts the presence of the government agent already reformulating the information. *Id.* From "something unusual" in the vehicle, the "secret compartments" had already transmuted to "something suspicious" by the time Deputy Wentland telephoned Sergeant Lewis to solicit his aid. Pet. App. 28a.

A. Where a government agent shared information, interpreted through the experiential bias of his law enforcement background, with another government agent affiliated with a different police agency, there was government action.

The private citizens in the case at bar never initiated contact with Sergeant Lewis. Indeed, but for the act of the other government agent, private citizens would have had no contact whatsoever with Sergeant Lewis. Moreover, in State

of Maryland proceedings, the private citizen, Bruce Willey, the auto technician, presented a distinctly different picture of his contact with Sergeant Lewis than Sergeant Lewis himself presented on the witness stand in the federal proceeding, black-letter testimony to which the Government stipulated. Mr. Willey's testimony does not paint a picture of voluntary cooperation; to the contrary, it depicts government control and direction.

DEFENSE COUNSEL: And do you recall what the problem was with the car?

MR. WILLEY: I was given the job to replace the fuel pump.

DEFENSE COUNSEL: And during your inspection of the car—were you the only mechanic that worked on the car?

MR. WILLEY: The fuel pump was ordered by another technician before.

DEFENSE COUNSEL: But were you *the only mechanic* that worked on the car?

MR. WILLEY: *Yes.*

DEFENSE COUNSEL: And when you were inspecting the car, was there something unusual you found?

MR. WILLEY: Yes.

DEFENSE COUNSEL: And as a result of that, what did you do?

MR. WILLEY: I notified the service adviser that I had found *something usual [sic]* and stopped.

DEFENSE COUNSEL: And as a result of what your service manager told you, what did you do?

MR. WILLEY: We went ahead and replaced the fuel pump, and finished the job up as normal, parked the vehicle.

DEFENSE COUNSEL: When you repaired the car, did you put everything in the car back together again the way a car would look?

MR. WILLEY: Yes.

* * *

DEFENSE COUNSEL: And during that day, did Sgt. Lewis arrive at Pohanka car dealership?

MR. WILLEY: Yes.

DEFENSE COUNSEL: Do you recall what time?

MR. WILLEY: Five o'clock.

DEFENSE COUNSEL: Did you meet him?

MR. WILLEY: I was leaving to go home. When I went outside to get in my vehicle, I seen Sgt. Lewis standing there, yes.

DEFENSE COUNSEL: And as a result of what Sgt. Lewis said, what did you do?

MR. WILLEY: *He asked me to pulled [sic] the vehicle back in.*

DEFENSE COUNSEL: Into––

MR. WILLEY: A service bay.

DEFENSE COUNSEL: And did you do that?

MR. WILLEY: Yes.

DEFENSE COUNSEL: After the car was pulled into the service bay, what did you do?

MR. WILLEY: I talked to Sgt. Lewis for a few minutes, kind of explained what I had seen, and that was basically it.

DEFENSE COUNSEL: Did you get out of the vehicle?

MR. WILLEY: Oh, yes.

DEFENSE COUNSEL: And who inspected the vehicle?

MR. WILLEY: Sgt. Lewis and Detective Wendelet [sic].

DEFENSE COUNSEL: Was there any other Pohanka employee there directing Sgt. Lewis through the inspection?

MR. WILLEY: *No.*

Pet. App. 74a-76a (emphases added).

Under oath, as will be shown below, Sergeant Lewis presented a much more passive picture to the district court, in particular omitting his directives to dealership employees. The transcript, however, makes clear that from his "initial" involvement in the case, he "took charge" and directed the activities of the private actors.

B. The District Judge reached his findings of fact by discrediting the testimony of the private citizen, crediting instead the testimony of the government agents.

Moreover, the district judge credited the government agents' version of the facts, *discrediting*—in the process—the private citizen accounts. The vastly superior resources of the Government in prosecuting crime notwithstanding, *see, Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 279 (1969), the Court appeared to bend over backwards to help the Government fill in factual gaps, despite the its having stipulated—therefore admitted—basic facts. For instance:

THE COURT: And my question is, I'm perfectly willing to accept the stipulation of Mr. Willey's testimony. That's fine if you don't want to call him. And I realized that all he said was that he said to the officers that something was suspicious.[1] I must say, based upon what I think *common sense* was, and it's now been laid out by *Sergeant Lewis*, *somebody*, when they got there, said, it wasn't like they just like they found a suitcase sitting there or something. *Somebody*, whether it was Willey or it was *somebody* else, *somebody* elucidated it by verbal act or by *something*, that it had to do with a secret compartment. I think otherwise there wasn't any reason for all of this to unfold.

Pet. App. at 50a (emphasis supplied).

Thus, the District Court "elucidates" how Sergeant Lewis learned, from a "private citizen," about the "secret compartments." It was not Mr. Willey—ostensibly the private citizen who had the information to share the police—who told him. Pet. App. at 50a. "Somebody" else told him. "Somebody." The court is not certain who it was; however, certain that "somebody" was a private citizen and not a government

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[1] As shown, Mr. Willey, in fact, never used the word "suspicious," which was, instead, the law enforcement officers' term. Mr. Willey reported finding something "unusual." "Unusual" is defined as, "uncommon or rare." Merriam Webster Collegiate Dictionary (Eleventh ed., 2003) at 1374. "Suspicious" is defined as: "tending to arouse suspicion; questionable." Merriam Webster Collegiate Dictionary (Eleventh ed., 2003) at 1260. While the latter clearly has a criminal connotation, the former clearly *does not*. As such, the state actors connnoted the entire specter of criminality in their own minds: the language of the private actor was, by definition, *not* an indicator of criminality.

agent. In reality, the Court "finds" facts that are nowhere in the evidence. Pet. App. 50a.

More to the point, since the parties were stipulating to a version of the facts proven in the State court proceedings, arguably both the Government and the Court relinquished the opportunity to adduce supplemental facts that would "flesh out" the Government's position. It is axiomatic that "stipulation 'may be no match for the robust evidence that would be used to prove' the stipulated fact." *United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2004).

C. The Prosecutor herself conceded that the information given the authorities by the private citizen was not enough to justify a warrantless search of the vehicle.

There is very little disagreement between most of the actors at the suppression hearing, that the testimony of the Pohanka mechanic, Bruce Willey, did not alert the Government to the specific presence of a "false compartmenr," which the Court specifically noted was not *per se* indicative of criminality anyway. Pet. App. 56a.

ASST. U.S. ATTORNEY: In the state court transcript, the mechanic basically testified in response to questioning on direct that he notified his service adviser that he had found *something unusual* during repair of the fuel compartment.[2] *And it*

[2] Sneaking the word "compartment" into the record seems to be a favored Government strategy here. The mechanic, Bruce Willey, was not repairing a "fuel compartment," but a faulty fuel *pump*. The "something unusual" was located inside the *gas tank*. Pet. App. 50a, 74a-75a. Sergeant Lewis, moreover, received the "relayed information" about the "false compartment," directly in conversation with Deputy Wentland, rather than a private citizen.

never went beyond that in terms of what was—

THE COURT: What are you going to find? Are you going to find a suitcase? What you're going to find is a *secret compartment.*

ASST. U.S. ATTORNEY: A secret compartment. And the *sergeant will testify* that the information that *was relayed to him* was that there was *a hidden compartment in the vehicle.*

Pet. App. 24a (emphases added).

And further:

THE COURT: Let me hear the government's position on, assume that *all the officers* were *told that there was something suspicious* by the car dealer.

* * *

ASST U.S. ATTORNEY: Your Honor, if Sergeant Lewis arrives on the scene with only knowledge that there's something suspicious in the vehicle and he is no given more specifics as to what that suspicious thing is, then *the government's position would be that that alone is not detailed enough to assist him in the subsequent stop.*

Pet. App. 27a (emphasis added)(transcript page 26).

Later, on the stand, in the transcript excerpt upon which the Fourth Circuit relied to support its "no government action"

theory of affirmance—what emerges is that the "private citizen" upon whom Sergeant Lewis relied for "relay" of the information about the "secret compartment," is really no private citizen at all; rather, he's a government agent, who has "no idea" what the technicians are talking about, without searching the van. Sergeant Lewis presents the events, however, in a far different light than the private citizen, Mr. Willey, portraying the police as merely passive observers at the scene:

SERGEANT LEWIS: Your Honor, a phone call came into the barrack and I was asked to pick up a line. When I picked up the line, it was a *Wicomico County sheriff's deputy* that I'm familiar with, Carson Wentland, he's a detective there. And *he had told me* he got a phone call from the Pohanka Mazda dealership in Salisbury, and their service technicians had been doing some repair work on a van and they found *something suspicious* inside the gas tank. And I said, what do you mean *suspicious*? He said, *apparently*, a false compartment, but they want me to come take a look at. He said, Mike, *I have no idea what I'm looking at. Can you meet me down there? I said, I'll meet you there in five minutes.*

. . . I got there right about the same time the deputy did. And he and I met with the service manager, I believe his name was

John Fiscus. And there were other technicians there. But I remember one because I graduated from high school with him, a guy named Bruce Willey. . . . *And we went into the service bay there. They brought the van in.* And they directed my attention or our attention, myself and the detective's attention, to the right front seat area. And they showed us a *false compartment* in the gas tank.

ASST. U.S. ATTORNEY: Now, in observing that false compartment, did you take any action, touch the vehicle in any way to observe that false compartment?

SERGEANT LEWIS: Yes, ma'am, I did.

* * *

I saw a black wire going down inside the gas tank. If, in fact, this was an electronically controlled compartment, I knew if I could electrify these wires or put power to these wires, it would jump the compartment open so I could inspect inside the compartment.

Pet. App. 83a-84a.

From the transcript, the sequence of events is indisputable. The deputy/detective and state police sergeant got some general information from the service technician. Pet. App. 28a.

But, without searching, the government agents otherwise had "*no idea*" what was in the van. Pet. App. 28a (emphasis added). Thus, they elected to effect a warrantless search. Pet. App. 28a. During the warrantless search, they learned that the "something unusual," about which they otherwise had "no idea," was, in fact, a "secret compartment." Pet. App. 74a-75a, 28a-29a. The "something unusual" did not actually transmute, there-fore, into a "secret compartment" until the search was a *fait accompli*. Pet. App 28-29a.

D. The decision below appears to create a conflict with other decisional law in both the Fourth and Ninth Circuits.

Specifically, *Seldon* appears to create conflict with *United States v. Rhodes*, 713 F.2d 463 (9th Cir. 1983). Specifically, though the question of what constituted a "government agent" was decided in the context of due process entrapment, in *Rhodes* there was an exchange of information between a bounty hunter and police officers. *Id.* at 467. Cunningham, the bounty hunter, eventually arranged a meeting between the defendant and undercover postal inspectors. In *Rhodes*, it was specifically Cunningham's private role and his own interest in sharing the information—receiving compensation—that precluded the Ninth Circuit from considering him a government agent. *Seldon* also appears to raise an internal conflict with decisional law in the Fourth Circuit, i.e., with *United States v. Jarrett*, 338 F. 3d 339 (4th Cir. 2003), for instance. In *Jarrett*, a government informant computer hacker gained unauthorized access to the criminal defendant's computer, and turned the materials over to the government. In that case, the information was highly probative and of great utility to the government. The hacker, however, was ruled not to be a government agent for Fourth Amendment purposes, by virtue of the government's limited participation and lack of acquiescence in the search.

In the instant case, however, the information from the source "private individual" had already been transformed by Deputy Wentland by the time he shared the information with the second law enforcement officer, Sergeant Lewis. Moreover, Deputy Wentland's solicitation of Sergeant Lewis was premised on another important fact: *the information had limited or no law enforcement utility without searching.* Pet. App. 28a. Passing on the information from one officer to another was specifically premised on a government agent's interpretation, who was p search. Pet. App. 28a. Here, also, as the Fourth Circuit expressly found, Sergeant Lewis's contact had no independent source from its very outset, because he was directly solicited to expand the private search by another police officer.

II. Review is urgently needed, because there is little or no authority from this August Court on the issue of third party consent to search private vehicles held by a bailee for the limited purpose of repairing the vehicle.

The Fourth Circuit, erroneously finding that Sergeant Lewis had received the information from an independent source involving no government action, dodged the entire constitutional question here as to the effect of the earlier search on the later one. That omission is especially important, specifically because there is very little authority from this August Court directly on point. This is apparent from the order and opinion of the Court of Special Appeals of Maryland, which relied upon Professor LaFave's treatise, 3 W. LAFAVE, SEARCH AND SEIZURE §§ 8.6(a)(3d ed.1996) and the Fourth Circuit's opinion in *United States v. Eldridge,* 302 F.2d 463 (4th Cir.1962). The novelty of the question, i.e., third party consent to search bailed vehicles, is one the Court should address.

Further, *Jacobsen*, upon which the Government relied, does not present a good analogy: in *Jacobsen* the private

actors had breached the exterior of the container involved and saw the contraband in plain view. *United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed.2d 85 (1984). Here, we have a secreted, closed container in a vehicle. It has not been breached to reveal its contents. As the district court judge conceded, moreover, having a secret compartment installed in a vehicle, like other "customization" of vehicles, is not in itself indicative of a crime. Pet. App 56a.

A. The limited purpose of the bailment had been achieved and all possessory rights and expectation of privacy had reverted to the bailor.

The lack of direction from the Court of Appeals on the bailment issue, and the Government's overreaching argument in the District Court that virtually unfettered searches of bailed property are the constitutional *norm* under the circumstances of the case, are both particularly troubling, especially given the authority upon which the Government relied. *Jacobsen*, 466 U.S. at 114, 104 S. Ct. at 1654, 80 L. Ed. 2d. at 85. In the context of contract interpretation—particularly in the milieu of automobile insurance contracts—the question of consent and bailment of automobiles has been dealt with extensively, construed under various state statutes and cases either strictly, moderately or liberally; however, in the context of third party searches there has been relatively scant application. *See, e.g., Chapman v. United States*, 365 U.S. 610, 81 S. Ct. 776, 5 L. Ed.2d 828 (1961).

Under the "strict" rule, permitted use of the vehicle will not deviate from the use contemplated by the parties at the time of granting the permission, imposing 1) temporal, 2) territorial, and 3) "specific use" limitations on the bailee. 7 Am. Jur. 2d, *Automobile Insurance* § 120 (2006). *See also Johnson v. American Automobile Insurance Co.*, 161 A. 496 (Me. 1932); *Travelers Insurance Co. v. Greenough*, 190 A. 129 (N.H. 1937); *Laroche v. Farm Bureau Mutual Automobile Insurance Co.*, 7 A. 2d 361 (Pa. 1939); *Eagle Fire Co.*

of New York v. Mullins, 120 S.E.2d 1 (S.C. 1961); Annot., 5 A.L.R.2d 600 (2005).

Under the "moderate rule," consent by the bailor to the bailee's use of the automobile is generally recognized, unless such use is considered a "gross violation" of the terms of the original bailment. 7 Am. Jur. 2d, *Automobile Insurance* § 122 (2005). As such, the "moderate rule" is an *ad hoc* principle, requiring a determination on a case by case basis. *Id.*

Under the "liberal" rule, if the original taking is with the bailor's consent, every subsequent act, short of theft and the like, is considered authorized, whether or not the bailor originally authorized the bailee's specific conduct or act. The only prerequisite is permission to use the automobile in the first place. 7 Am. Jur. 2d, *Automobile Insurance* § 121 (2005); *Jefson v. London Guarantee and Accident Co.*, 11 N.E.2d 993 (Ill. App. 1937); *Arndt v. Davis*, 163 N.W.2d 886 (Neb. 1969); *United States Fidelity and Guaranty Co. v. Fisher*, 94 P. 2d 549 (Nev. 1972); *Small v. Schuncke*, 201 A. 2d 56 (N.J. 1964); *Matits v. Nationwide Mutual Insurance Co.*, 166 A. 2d 345 (N.J. 1960); *Stovall v. New York Indemnity Co.*, 8 S.W.2d 473 (Tenn. 1928).

In the case *sub judice*, as the Court of Special Appeals of Maryland correctly determined, because the bailment of the automobile in question was for a specific and limited purpose, that purpose and those limitations must be taken into account in any calculus of the risk assumed by the bailor. 3 W. LAFAVE, SEARCH AND SEIZURE §§ 8.6(a)(3d ed. 1996). The special and limited purpose of the bailment here was to repair the vehicle, which imposed the strictures of the "strict" rule on the bailor, Pohanka Mazda as to time, place, and "specific use" of the Appellant's Mazda van. *Id.*

B. The search conducted by the government agents was more intrusive than inspection of the vehicle by the Pohanka Mazda mechanics.

The authority upon which the Government relies, moreover, is also completely unavailing to support its position, because it is inapposite, failing to present an analogous situation. Notably, however, the *Jacobsen* Court counseled the Government to exercise restraint in conducting warrantless searches, prefacing its holding with this precaution:

> When the wrapped parcel involved in this case was delivered to the private freight carrier, it was unquestionably an "effect" within the meaning of the Fourth Amendment. Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; *warrantless searches of such effects are presumptively unreasonable.* (Internal citations omitted). Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, *the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package.*

United States v. Jacobsen, 466 U.S. 109, 114, 104 S. Ct. 1652, 1657, 80 L. Ed. 2d 85 (1984).

In *Jacobsen*, the Federal Express agents in question discovered cocaine in a shipping tube that had either been broken open or cut open in transit.[3] *Id.* The private freight carrier discovered the cocaine, which—at the time the government agents arrived on the scene—the private actors had already observed. *Id.* The private actors could attest to the granular quality of the substance, such that, government agents were

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[3] The facts of the case are inconclusive as to whether there was suspicion by a Fedex employee that the tube in question contained cocaine, intending to explore the question, or whether the tube was accidentally opened by an encounter with a forklift.

only required to use a very small sample of the already exposed white powder, to determine its chemical composition as cocaine hydrochloride. *Id.* Thus, in *Jacobsen*, this Honorable Court affirmed the validity of the warrantless search, because the scope of Government action did not exceed the scope of private action, and there was no legitimate privacy interest infringed by the Government that the Federal Express employees, private actors, had not already infringed. *Id.*

However, the *Jacobsen* Court also noted that:

> [A]dditional invasions of respondents' privacy by the Government agent *must be tested by the degree to which they exceeded the scope of the private search.* That standard was adopted by a majority of the Court in *Walter v. United States, supra.*

Id. at 116 (emphasis added).

In *Walter v. United States*, 447 U.S. 649, 662, 100 S. Ct. 2395, 65 L. Ed. 2d 410 (1980), the opposite circumstance presented: the scope of government intrusion exceeded that of the private actor, the search was conducted without a warrant and there was no exigency. The *Walter* Court stated:

> If a properly authorized official search is limited by the *particular terms of its authorization, at least the* ***same kind of strict limitation*** *must be applied to any official use of a private party's invasion of another person's privacy.* Even though some circumstances—for example, if the results of the private search are in plain view when materials are turned over to the Government—may justify the Government's reexamination of the materials, surely the Government ***may not exceed the scope of the private search*** *unless it has the right to make an independent search.*

Id. (emphases added).

Thus, the High Court ruled the search facially unreasonable and reversed the Appellant Walter's conviction on obscenity charges. *Id.*

In the instant case, the record shows facts more analogous to *Walter* than to *Jacobsen*. Specifically, the scope of the intrusion effected by Sergeant Lewis far exceeded the scope of the intrusion by the private actors, a fact which is uncontroverted on this record:

DEFENSE COUNSEL: Did you take tools to the scene? I overheard you this morning that you didn't take any tools to the scene.

SERGEANT LEWIS: No, sir, I did not, with the exception of the wire clips, the alligator clips.

DEFENSE COUNSEL: Let me see if I understand this. What tools did you take to the scene?

SERGEANT LEWIS: I have tools in the trunk of my car, Your Honor, including alligator clips, two sets.

DEFENSE COUNSEL: From what I — sorry.

SERGEANT LEWIS: There were tools provided by the mechanics that were there in the garage.

DEFENSE COUNSEL: You didn't use any of your tools?

SERGEANT LEWIS: I don't recall whether I used my straight edge screwdriver or a straight edge screw driver provided by the mechanics. But I requested a straight edge screw driver and that's what I used to pry the rear portion of the seat up, to look down inside the compartment.

DEFENSE COUNSEL: You testified under oath before Judge Loney that you had taken alligator clips to the scene.

SERGEANT LEWIS: That's what I said a while ago, yes, sir.

DEFENSE COUNSEL: And it was your alligator clips that you used to try to work these wires?

SERGEANT LEWIS: That is correct , sir.

See, Pet. App. 83a-84a.

Earlier in the proceeding, Sergeant Lewis explained his purpose in bringing the alligator clips to the scene: *to expand the intrusiveness of his search into the compartments.* The record also irrefutably supports the position that the private actors never so much as contemplated any action to open the "something unusual" compartments.

SERGEANT LEWIS: I saw a black wire going down inside the gas tank. If, in fact, this was an electronically controlled compartment, I knew if I could electrify these wires or put power to these wires, ***it would jump the compartment open so I could inspect inside the compartment.***

Pet. App. at 29a-31a; 83a-84a.

Not only did Sergeant Lewis locate the "compartments," after speaking with the mechanics, who reported "something unusual;" not only did he virtually pull up the floorboards in the vehicle to expose the "compartments;" Pet. App. at 29a-31a. Sergeant Lewis then attempted to *open* the compartments by applying an electrical charge and "alligator clips." Pet. App. 31a; 83a. He was not searching merely to confirm the existence of the compartment or an outside shell: he was on a mission to get *into* the compartments, to *open* and locate

contraband in them, doing so without consent, in a vehicle whose owner (and driver) was not even at the scene. Pet. App. 28a-30a.

Here, the same scenario presents as in *Walter*: no warrant, no exigency, no consent to search, and the extent of the intrusion by the governmental actor exceeded the scope of the intrusion by the private actor. *Walter*, 447 U.S. at 662. In *Jacobsen*, the private actors already had knowledge of the contraband. 466 U.S. 109, 114, 104 S. Ct. 1652, 1657. In the case *sub judice*, however, the private actors had general knowledge of something "unusual," which the authorities used to pursue a search at the scene, designed to procure evidence much more specific and incriminating, and *completely without reason*: with the owner of the vehicle nowhere in sight, procuring a search warrant, as the Court of Special Appeals of Maryland has noted, was Sergeant Lewis's only "reasonable" investigatory prerogative. *Seldon v. Maryland*, 824 A.2d 999, 1015 (2003). What occurred here was a "general exploratory search from one object to another, [in the hope that] something incriminating at last emerges," of the ilk specifically condemned in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed.2d 564 (1971).

III. The district judge abused his discretion by indicating on the record that he was disinclined to apply the exclusionary rule based on personal prejudice, being "tired of having to let people [go]," on Constitutional grounds.

At the suppression hearing, the District Court abused its discretion, relying on no legal authority whatsoever in support of its opinion, tending to indicate that it was reluctant to apply the law on the basis of what it considered compelling facts. Pet. App. 67a. By definition, a court abuses its discretion when it makes an error of law or refuses to apply the law. *Koon v. U.S.*, 518 U.S. 81, 116 S. Ct. 2035, 135 L.

Ed.2d 392 (1996)(*citing, Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S. Ct. 2447, 110 L. Under a traditional "fruits" analysis, moreover, Fourth Amendment violations have traditionally *mandated* a *broad*—rather than narrow—application of the exclusionary rule to "evidence discovered as a result of an unconstitutional search." *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985) (emphasis added). In fact, Sergeant Lewis eventually managed to open one of the compartments, which—as the facts as found in the State proceedings demonstrated, *Seldon*, 824 A.2d at 1002—turned out to be empty.

Here, the District Court offered no legal rationale or any specific legal authority to support its denial of Petitioner's Motion to Suppress. Disturbingly, the Court resisted even applying the law, commenting that it was "tired of having to let people [go]" on what would appear to be purely legal grounds, relying entirely on a "common sense" approach to the facts. Pet App. 67a; *James v. Jacobson*, 6 F.3d 233 (4th Cir. 1993)(abuse of discretion occurs when the court either refuses to exercise its discretion, or arrives at an erroneous determination of either the law or the facts).

CONCLUSION

For the reasons stated, this Honorable Court should grant the Petitioner the requested relief, and issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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July 17, 2007

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-4473

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RONALD LAMONT SELDON, a/k/a Pee Wee,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
J. Frederick Motz, District Judge.
(CR-03-93-JFM)

Argued: February 2, 2007
Decided: March 15, 2007

Before WIDENER, MICHAEL, and KING, *Circuit Judges.*

Affirmed by published opinion. Judge King wrote the opinon, in which Judge Widener and Judge Michael joined.

COUNSEL

ARGUED: Ronald Ira Kurland, LAW OFFICES OF KURLAND & KURLAND, Baltimore, Maryland, for Appellant. Christine Manuelian, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. ON BRIEF: Rod J. Rosenstein, United States Attorney, Baltimore, Maryland, for Appellee.

OPINION

KING, Circuit Judge:

Ronald Lamont Seldon appeals the denial of his motion to suppress evidence discovered as a result of a July 13, 2000 search of his vehicle by the Maryland State Police (the "MSP"). Seldon was convicted, in the District of Maryland, of conspiracy to distribute and possess with the intent to distribute cocaine hydrochloride and cocaine base, in violation of 21 U.S.C. § 846; and conspiracy to engage in unlawful monetary transactions, in violation of 18 U.S.C. § 1957(a). These convictions were the result of Seldon's conditional guilty plea, pursuant to which he reserved his right to appeal the suppression ruling. Seldon contends that the evidence underlying his convictions was the fruit of an unlawful search of his vehicle. As explained below, we reject this contention and affirm.

I.

A.

1.

On October 29, 1999, Sgt. Mike Lewis of the MSP received a telephone call from Deputy Carson Wentland of the Wicomico County (Maryland) Sheriff's Department. Deputy Wentland related that he had been contacted by the Pohanka Mazda dealership in Salisbury (the county seat of Wicomico County), and informed that Pohanka's service technicians had found what was "apparently a false compartment" in a van that had been brought to the dealership for repairs. Supp. J.A. 68.[1] Sgt. Lewis was the MSP's instructor on the subject of traffic stop techniques, including how to detect hidden compartments in vehicles, and Deputy Wentland requested his assistance in responding to the Pohanka call.

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[1] Citations herein to "Supp. J.A. ___" refer to the contents of the Supplemental Joint Appendix filed by the parties in this appeal.

When Sgt. Lewis arrived at Pohanka Mazda later that day, he spoke to the service technicians who had reported the hidden compartment. The vehicle in question was a white 1998 Mazda MPV minivan that had been brought to Pohanka for service because it was "hard starting" and "cut[ ] off after starting." Supp. J.A. 74. Pohanka technicians informed Lewis that they had traced the problem to the fuel pump, which was inside the gas tank, and that when they had attempted to access the tank to repair the pump, they had discovered two hidden compartments. One of the compartments was located inside the gas tank, and the other was located near the gas tank.

After his initial conversation with the technicians, Sgt. Lewis conducted his own firsthand examination of the van's interior (the "Pohanka search"). The compartment inside the gas tank (the "first compartment") was accessible by removing some bolts from the front passenger-side seat and lifting the seat upward. Pohanka personnel guided Lewis to the seat and lifted it to reveal the first compartment; the bolts had been removed earlier. The technicians then showed Lewis what appeared to be the exterior of a second compartment, this one underneath the middle passenger-side seat (the "second compartment"). Unlike the seat above the first compartment, the seat above the second compartment could not be lifted by hand; rather, it appeared to be secured and controlled by a system of electronically operated pistons. Lewis noticed a wire near the second compartment, and knew from experience that it might control the pistons that secured the seat. He attached alligator clips to the wire and directed electrical current into it in an attempt to raise the seat and expose the compartment. This effort to raise the seat was unsuccessful, however, and Lewis took no further steps to access the second compartment.

After he had concluded the Pohanka search, Lewis asked the dealership employees who had brought the minivan in for

repairs. The Pohanka personnel informed Lewis that "it's a guy that brings it in here all the time," named Ron Seldon. Pohanka employees also gave Lewis a photocopy of the documentation for the service visit, which indicated "who brought the vehicle in." Supp. J.A. 74. Lewis recorded the minivan's license plate number and vehicle identification number. He also contacted the Wicomico County narcotics task force and learned that Seldon was suspected of being a major drug dealer. Lewis filed incident reports concerning Seldon and the van with the Wicomico County narcotics task force and the Drug Enforcement Agency.

2.

Nine months later, on July 13, 2000, Lewis was driving on Route 50 in Annapolis, Maryland, when he observed Seldon traveling at approximately 71 miles per hour in a 55 mile per hour zone. Lewis stopped Seldon for speeding in the van in which the Pohanka Mazda technicians had discovered the hidden compartments. Lewis later testified, however, that he did not recognize the vehicle at the time he initiated the stop. When Lewis approached the van, Seldon rolled down the vehicle's window, and Lewis "immediately was met with a very strong odor, overwhelming odor of air freshener, coupled with fabric softener sheets." Supp. J.A. 81. Based on his knowledge and training, Lewis knew that individuals transporting illicit drugs commonly use large amounts of air freshener to mask the drugs' odor. Lewis also observed several decals on Seldon's windshield indicating support for police charitable organizations. Lewis was aware that vehicles used to transport contraband often bear such collections of pro-police decals.[2]

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[2] Lewis also testified that he detected, emanating from Seldon's vehicle, an odor that he associated with large quantities of illicit cocaine. The district court concluded that Lewis's belief that he had smelled cocaine was not a legitimate basis for his search of the van. Supp. J.A. 198. Because we agree with the court that factors other than Lewis's asserted de-

Lewis asked Seldon for his driver's license and registration card. When Seldon reached into his pocket to retrieve his driver's license, he also brought out a thick bundle of cash, which Lewis recognized as another indicator of illegal drug activity. In addition, as Seldon searched for his registration card, Lewis noticed signs that he was nervous: he was breathing very deeply, his carotid pulse was pounding, and he avoided eye contact with Lewis. "In fact," Lewis testified, "on one occasion he actually stopped doing what he was doing and he just sat in his seat and . . . sighed, and then he started looking again for the registration card." *Id.* at 82.

When Lewis saw the name on Seldon's driver's license, he realized that Seldon was the individual whose minivan he had examined at Pohanka Mazda. Lewis also recalled that Seldon was the subject of an investigation by the Wicomico County narcotics task force, and he called a task force official to make sure that any action he took with regard to Seldon would not interfere with that investigation. The official advised that the task force had no objection to Lewis's taking enforcement action against Seldon. Lewis then called for backup and conducted a search of Seldon's van (the "Annapolis search"). In the hidden compartment under the middle passenger-side seat, he found a package containing approximately 500 grams of cocaine and two packages containing a total of approximately 850 grams of marijuana. Each package was wrapped in fabric softener sheets, saran wrap, and clear packing tape.

After the Annapolis search, law enforcement officials continued to investigate Seldon's illegal activities. In the course of such investigation, they sought and obtained search warrants for areas (including buildings) in which Seldon pos-

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tection of the scent of cocaine gave him probable cause to search Seldon's vehicle, we need not reach or address the issue of when, if ever, an officer's perception that he has smelled cocaine can contribute to probable cause for a search.

sessed a privacy interest. Probable cause for these warrants was provided, in part, by the evidence discovered in the Annapolis search. The searches conducted under warrants obtained after the Annapolis search yielded evidence that was used in Seldon's subsequent prosecution.

3.

On February 20, 2003, Seldon (along with co-conspirators including his mother, his girlfriend, and his girlfriend's mother) was indicted by a federal grand jury in the District of Maryland, on charges including conspiracy to distribute and possess with the intent to distribute cocaine hydrochloride and cocaine base, in violation of 21 U.S.C. § 846; and conspiracy to engage in unlawful monetary transactions, in violation of 18 U.S.C. § 1957(a).[3] On September 30, 2003, Seldon moved to suppress all seized evidence that had resulted from the Annapolis search, contending that the Pohanka search had been unconstitutional under the Fourth Amendment, and that Lewis would have lacked probable cause for the Annapolis search had he not learned of Seldon's hidden compartments in the course of his earlier unlawful Pohanka search.

On November 24, 2003, the district court held a hearing on Seldon's suppression motion. The court observed that Sgt. Lewis had lawfully learned, from his conversations with the employees of Pohanka Mazda — and independently of his personal examination of Seldon's vehicle in the Pohanka search — that Seldon was the driver of a van containing hidden compartments. *See* Supp. J.A. 205-06. In light of Lewis's training

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[3] Seldon was also prosecuted in the Circuit Court for Anne Arundel County, Maryland, on charges including possession of controlled substances with intent to distribute. In those proceedings, he made a suppression motion similar to the one at issue here. The circuit court denied his motion, but on appeal, the Court of Special Appeals of Maryland reversed, ruling that both the Pohanka and Annapolis searches had violated the Fourth Amendment. *See Seldon v. Maryland*, 824 A.2d 999 (Md. Ct. Spec. App. 2003).

and experience, the court concluded, this lawfully obtained knowledge, plus the other indicia that Seldon was transporting illicit drugs, had provided Lewis probable cause to conduct the Annapolis search. *See id.* at 223. The Annapolis search had thus been lawful even if the Pohanka search had not, because the latter search had not served as the basis for the former. Accordingly, the court, ruling from the bench, denied Seldon's motion to suppress the evidence that had resulted from the Annapolis search. *See id.* at 232.

On March 29, 2004, Seldon entered a conditional guilty plea, contingent on the reservation of his right to appeal the district court's suppression ruling. *See* Fed. R. Crim. P. 11(a)(2) (authorizing conditional guilty pleas). On June 8, 2004, the court sentenced Seldon to 360 months' imprisonment on each of the two counts of which he was convicted, those sentences to run concurrently. Seldon has timely appealed the denial of his motion to suppress, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

B.

In an appeal of a district court's ruling on a motion to suppress evidence, we review the court's legal conclusions de novo and its underlying factual findings for clear error. *See United States v. Rusher*, 966 F.2d 868, 873 (4th Cir. 1992).

II.

Seldon contends that Sgt. Lewis lacked sufficient lawfully obtained information to provide probable cause for the Annapolis search, and that the district court erred in concluding otherwise. The heart of Seldon's position is that Lewis's knowledge regarding Seldon and the hidden compartments was constitutionally tainted because it was the result of the Pohanka search, which Seldon maintains violated his Fourth Amendment rights. Thus, Seldon asserts, the only lawfully obtained information supporting the Annapolis search was the indicia of drug-running that Lewis observed when he pulled

Seldon over for speeding: the strong odor of air freshener, the thick bundle of cash, the pro-police decals, and Seldon's unusually nervous behavior. Those factors, Seldon contends, were insufficient to provide probable cause to search his vehicle.

Seldon altogether ignores, however, the district court's finding that Lewis knew of the hidden compartments, and Seldon's identity as the van's owner, from a source independent of the Pohanka search: the information reported by the Pohanka Mazda employees. And the evidence of record confirms the district court's finding in this regard. In the telephone call that initiated Lewis's involvement in this matter, Deputy Wentland, of the Wicomico County Sheriff's Department, notified Lewis that technicians at Pohanka had reported what was "apparently a false compartment" in a vehicle they were servicing. Supp. J.A. 68. When Lewis arrived at the Pohanka dealership, technicians there explained to him the nature of the hidden compartments that they had discovered. And, significantly, dealership employees—not Lewis's examination of the van's interior in the course of the Pohanka search—were also the source of his knowledge that Seldon was the van's driver. It is well settled that no constitutional violation occurs when a private citizen uncovers evidence of criminal activity and reports it to the authorities, regardless of whether the citizen discovers the evidence by means that would have been constitutionally available to government agents. *See United States v. Jacobsen*, 466 U.S. 109, 119-20 (1984); *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

Because Lewis had an independent, untainted source for his knowledge of the hidden compartments and Seldon's connection to them, he could lawfully rely on that knowledge in deciding to conduct the Annapolis search—even if the

Pohanka search had been unlawful.[4] See *United States v. Wardrick*, 350 F.3d 446, 452-53 (4th Cir. 2003) (where information underlying search warrant was obtained through assertedly unlawful search, fact that same information was also obtained from independent, lawful source cured any possible taint); *Sutton v. United States*, 267 F.2d 271, 272 (4th Cir. 1959) ("It is one thing to say that officers shall gain no advantage from violating the individual's rights; it is quite another to declare that such a violation shall put him beyond the law's reach even if his guilt can be proved by evidence that has been obtained lawfully."); *see also Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (recognizing that even illegally obtained facts are not "sacred and inaccessible" and that "[i]f knowledge of them is gained from an independent source they may be proved like any others"). And, we agree with the district court that Lewis's lawful knowledge concerning Seldon and the hidden compartments, combined with his observation of indicia that Seldon was transporting illicit drugs, provided probable cause for the Annapolis search. We therefore reject Seldon's contention that evidence resulting from the Annapolis search should have been suppressed.

III.

For the foregoing reasons, we affirm the district court's ruling on the suppression motion.

AFFIRMED

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[4] Because we conclude that Lewis possessed probable cause for the Annapolis search independent of the knowledge he acquired in the Pohanka search, we need not reach or address Seldon's contention that the Pohanka search was unconstitutional.

APPENDIX B

AFFIDAVIT IN SUPPORT OF SEARCH AND SEIZURE WARRANTS

Your affiant, Special Agent David M. Riven of the Drug Enforcement Administration hereby deposes and says as follows:

* * *

III. BASIS OF INVESTIGATION

1. On October 29, 1999, POHANKA MAZDA in Salisbury, Maryland contacted the Wicomico County Sheriff's Office regarding a white 1998 Mazda MPV mini-van that had been brought in for service. The van bore Maryland registration M154920 and was dropped off by Ronald SELDON. While working on the van, mechanics noticed that the vehicle's gas tanks had been physically altered. An examination of the vehicle by Sergeant Michael Lewis of the Maryland State Police revealed two hidden compartments, in the gas tank capable of holding numerous kilograms of cocaine. The vehicle was repaired by POHANKA MAZDA and returned to Ronald SELDON without his knowledge that the compartments had been found.

* * *

APPENDIX C

Transcript of traffic stop by Sgt. Michael Lewis on July 13, 2000.

L = Sgt. Michael Lewis, MSP
D = Dispatcher
S = Seldon

L: One male date of birth 9/81/74, thru Maryland.

D: 10-4

(Dispatcher addressing unrelated calls)

D: Annapolis 7-29

L: Go ahead

D: Negative on the Seldon subject , he shows address in Salisbury, shows a valid "C", Charles, expires 9-8-03, he has seven current.

L: 10-4 and I copy.

Can I talk to Kenhart please.

L: Mike Kenhart, Mike Lewis. I am going to tell you something you ain't going to believe, you probably are. I stopped this white MPV flying eastbound on 50, guess who's driving?

L: No, it's Ronald Seldon, well yeah yeah.

L: Mike, he's scared, it's in here, he is terrified, scared to death. He's right by himself. I'm right here in Annapolis. Mike he's scared to death. I got enough to do him. He's terrified. It's 410 935 7191. He is scared to death. 7191, 935 7191. Okay, bunk, bye.

I just left Waterloo Barracks was on my way home. Traveling eastbound on Rt. 50 this subject traveling up the middle lane. Saw him change from slow lane to middle lane passing slower traffic paced the subject at

71 miles per hour in a posted 55. Stopped the vehicle traveling eastbound. Once I got to the vehicle realized I had my camera off ever since I was at Waterloo because I was riding the Assistant AG around today. I have come back to my car. I have activated my camera. I made a phone call I recognize this guy as being a large cocaine dealer. I recognize the name. I put 2 and 2 together and called the local task force. waiting for a response back from them right now as to what they want me to do. This man is scared to death. An overwhelming odor of air freshener emanating from the vehicles interior. Got extremely nervous. carotid pulse is pounding in his neck. No doubt in my mind there is something inside this vehicle. Can clearly smell the odor. can clearly smell the odor of cocaine coming from within this vehicle as I spoke to him on the passenger side. It is rare that I will smell that, but I can smell the actual definitive odor of cocaine There is either a strong air freshener smell or perhaps a masking agent smell coming from the passenger window.

(Phone ringing)

L.: Hey, hello.
Okay, uh huh, okay. Absolutely not. Mike, he's terrified. He's scared to death. I'll do whatever you guys suggest I do. He's valid, he has 7 points on his driving record, but he is valid. He's scared to death.

How about Chris Ford, she's K-9 girl working this area. Let me see if she is working, hold one second.

L: 7-29 Annapolis

D: 7-29.

L: Is Trooper Ford working?

D: 10-74 she's on special assignment today at the K-9 Center.

L: Does Annapolis P.D. have a K-9?

D: 10-4, I'll have to check with them.

L: 10-4, I'm eastbound Rt. 50, just of west of White hall Road. I need K-9, 10-25 this location, please.

D: Eastbound and west of Whitehall?

L: That's correct between Old Mill Bottom and Whitehall. 10-63, 10-28.

L: (Resumes Cellphone conversation) He's got seven points Mike, but he is valid. He's treating, he wanted to know why I was asking all kinds of questions. When I went up to <u>him</u> Sir, how you doing, where you coming from

D: Annapolis advised 10-74, we are going to check with the county reference the dog.

L: 10-4.

L: and ah where you coming from

D: 10-28.

L: Maryland registration, M, Mary, 322822, that's M, Mary, 322822.

D: 10-4. Do you want me to start another unit to you?

L: That's correct. You can start another unit, but I am Ocean King.

D: 10-4. It was 10-74 from the county reference the dog.

L: 10-4.

L: (Resumes cellphone conversation) I have no dog Mike. Based on the traps that I know are in here. Based on his body language we have enough. Oh I

think so, call Beau Ogelseby real quick and call me back. Uh huh. Uh huh Okay. Ain't no doubt in my mind...Mike he's terrified Listen to me I can smell a strong odor of fabric softener and air freshener coming from the passenger side window. I can also smell what I believe is cocaine and I rarely smell cocaine unless it is in bulk form and I can smell what I'm almost certain is cocaine but it is mixed in with a masking agent. I was trying to stand there as I was talking to him so I could get a definitive on what I am smelling. I believe it is cocaine, but I can't swear to it.

Mike this is the van that I got the two compartments in it, so I know right now that is enough probable cause in and of itself. I'm going to. I will let you know when the other trooper gets here. Okay, I will partner. When . . . Okay, when we do what we got to do. Okay, partner. Bye.

L: 7-29 Annapolis

D: 7-29

L: 10-43. I'm likely going to be doing a search on this vehicle if you could start, if you have availability, have a couple troopers respond. But I am Ocean King.

D: 10-4, J-12 units are en route to your location.

L: 10-4. Also, can you give me a CH on this subject

D: 10-9?

L: Will you run a criminal history on this subject.

D: 10-4, I checked with Centerville and Glen Burnie, negative on the K-9.

L: 10-4

D: 7-29 Annapolis

L: Go ahead Annapolis

D: Subject shows a 98 Mazda van registered to Yvonne Seldon in Salisbury. 10-29 negative.

L: 10-4. Advised 1-12 is en route.

D: He should be out with you shortly.

L: Come on back here I want to talk to you for a minute. Come on back here. Come on over here big guy I don't want you to get hit. Is Yvonne Seldon your mom?

S: Yes.

L: Let me ask you a question. When I was standing up there a while ago, next to the passenger side window. I got a strong odor of air freshener coming from out of the vehicle and I believe I am smelling, thru my experience, that I am smelling cocaine. Do you have any large amounts of cocaine in your van?

S: No I don't have nothing in my van. Where all these questions coming from?

L: Because sir I believe I smelling the odor of cocaine coming out of this van. I generally can't smell the odor of cocaine unless it is in a large amount Large amount. Do you have a large amount of cocaine in your vehicle?

S: Sir, I don't have anything in my vehicle.

L: Do you have a large amount of cocaine in that black bag?

S: No, sir.

L: Okay. I got another trooper that is on his way here. When he comes here I want to make sure that what I am smelling is not cocaine. Do you have anything illegal in your vehicle at all?

S: No, sir.

L: Okay I like to check it out. Do you have any problem with that?

S: Yes, I got a problem with that.

L: Okay, well, when the trooper gets here. I believe what I am smelling is cocaine,

S: Okay

L: So I have requested a drug dog respond to the scene.

S: Uh

L: A drug dog can certainly detect what I can't necessarily detect. Do you have a problem with a drug dog scanning your van?

S: I got a problem with all that because I am not doing anything wrong.

L: Okay, well trust me. You were stopped for a violation. I clearly smell what I believe is the strong odor of air freshener, which is not illegal. But it is coupled with cocaine, with what I believe to be cocaine through on my experience, Mr. Seldon

S: Right.

L: I obviously don't know you from Adam, you could be a lawyer you could be a doctor, I don't know

S: Right

L: But I believe what I am smelling is cocaine coupled with the air fresheners. So when another trooper gets on the scene I going to check the vehicle out, okay?

S: No, sir

L: Okay when the other trooper . . . You're welcome to have a seat in my car. You're welcome to have a seat in your van, whichever you would like to do. The other trooper is going to be here shortly. I would

rather you have a seat in my car, as opposed to your van, because I don't know if you have any weapons in there. Do you have any weapons in there? Do you have anything on you? Do you mind if I search you to make sure you don't have any weapons on you?

S: No, Yes, sir, I have a problem with you doing all this because I didn't do anything wrong.

L: Well, you are obviously very nervous right now.

S: No I'm not nervous at all

L: You were extremely nervous when you were sitting up in your van and you are extremely nervous now.

S: Sir, I'm not nervous. I'm not nervous at all.

L: Okay, tell you what I'm going to check the van because I believe that I am smelling cocaine coming out the van. If I'm wrong, I'm wrong and you are on your way. If I'm right and I believe I'm going to be what I'm smelling I believe I am going to find something in the van. Maybe it's in that bag on the front floor board. I don't know. But I know what I am smelling, I've smelled it many times before.

S: Sir, you can smell whatever but I know I'm not going nothing wrong. You pulled me over and said I was speeding, I was not speeding.

L: Sir, I'm

S: I'm not trying to

L: I appreciate that, I appreciate that. I been behind you pacing you. I saw you on the phone the whole time I was pacing you. I got up next to you thinking maybe he would slow down. You never even looked over at me at all, until I got ahead of you to see if you would see me and you finally saw me.

S: Sir, listen sir. Can you show me where you clocked me at?

L: I been pacing you

S: Sir, I'm not lying to you. I was not speeding at all.

L: okay, okay

S: I'm not trying to down you credibility as an officer, I'm not downing your credibility

L: I appreciate that, I appreciate that

S: I know people give you a hard time

L: They do, we do. You have been nice. Haven't I been nice to you? And I am going to be nice to you

S: Yeah, well you, I mean you been, you been nice to me until you said you smelled cocaine on me or whatever you said

L: No I didn't say I smelled it on you. I don't smell anything on you right now. I smelled it coming out of the van. When I was standing next to the van. I don't smell anything on you at all.

S: Then you telling me that you going to have me sitting here for a while.

L: No, no, I am not going to have you sitting here for a while, 5 minutes. 5 minutes, that's all. I'm not going to have you sit here for 20 minutes, 25 minutes. I am not going to do that. Okay Be right with you. Stand tight for a second.

(Second trooper arrives)

L: 7-29

D: 7-29

L: Code 77 this location, this vehicle, I'll be out.

D: 10-51

L: Negative. Code 77 I'll be searching the vehicle this location, suspicious vehicle

D: 10-4 direct

L: 10-4

L: Pat you down make sure you don't have weapons, what is that?

S: That's my wallet

L: Will you take it out so I can make sure it's not a weapon. It is more than that.

S: That's money

L: What's all that over here

S: That's about my religion

L: Okay, that's fine

(Search of vehicle begins)

L: Put your hands behind your back, hands behind your back. Turn around now. Something is wrong underneath this seat. Put him in the front seat of my car until I can determine what is underneath this seat. Looks like it might be a compartment underneath this seat.

L: Something wrong with that seat. I'm going into it big guy, is there anything in there?

S: Sir, I don't know what you're talking about

L: That's not your van is it?

S: I don't know what you're talking about.

L: Okay

L: 7-29 Annapolis

D: Annapolis 7-29

L: You want to start another unit this way. I have what I believe is a false compartment in the floor, we are going to try to access it here on the roadside

D: 10-4 direct

S: Can I make a phone call.

L: Not now.

L: Now that I have the doors open I can smell cocaine big time. We are going to get into it here shortly

S: Sir,

L: Mr. Seldon

L: Trooper come here a second, see that Sheet metal, it's after market. There has definitely been a modification made here. I'll have a job getting in here, but there is definitely a false compartment in here.

(Third Trooper arrives.
Advises stop is audio and video taped)

Dialogue between troopers to locate tools to access traps.

L: He refused me consent. These bolts have been in and out several times, it is a dead give away. Found one false compartment, it is on hinges. You look down inside of here it is just loaded with air fresheners. See that's a stainless steel tank built down in there if you

That compartment's empty, it is built down inside the gas tank. This one is not electronically or hydraulically controlled. First one is empty. This one may be empty because it is easy to open. The other one appears to be electronically controlled which may make it a little bit harder to access.

L.: First of all, see these bolts right here? They should be bolted to the floor. They tack welded it to the top of this to make it look like it is factory. There is no bolt at all. They tack welded it, there was a bolt from the factory. But this is controlled probably electronically and hydraulically to lift up, so now I got to locate the wires that go into the compartment.

L.: Okay, here's the wires. This indicates at least to hydro piston, one going to a piston here and one going to a piston there. Pop the hood It is loaded. I can see multiple packages. We're loaded. We will take the vehicle back to the barracks and access there. Not going to do anymore work on the roadside. Request a 10-51 it is loaded inside. State storage.

L.: Sir, you are under arrest for narcotics trafficking. I can see the multi packages beneath the second bucket seat there. There is nothing inside the first compartment. You are under arrest.

L: (Cellphone call to Mike) Hey, about what, okay tell him I'm in route with a 10-59, he'll be familiar. Two kilos, multi kilos, that's correct. I don't know. I could only gain access enough to see that it is packed in there. Okay, honey. Bye, baby.

L: I called Wicomico County Task Force. Evidently, he's one of their main targets in Wicomico County. Ronald Seldon. Ronald Lamont Seldon.

(Additional Conversation among troopers regarding assignments, etc.)

APPENDIX D

United States v. Seldon, Relevant Transcript Pages of Proceedings from Suppression Hearing, Including Bench Opinion of the Honorable Frederick J. Motz (November 24, 2003)[pp. 20-26, 68-73, 83-103, 142-143, 199-202, 212-234]

* * *

[20] want to pursue it, go ahead and pursue it. And maybe you have to because as I have analyzed this, frankly, or maybe we could reach the question of the legality, assuming that all that was reported by the dealer was something suspicious, then take a look at the legality of the search.

Because it seems to me that if you add knowledge of a suspicious compartment to what Officer Lewis knew at the time of the stop, then the government has a serious argument that probable cause exists. And that's something which I'm not prejudging but that's something which I want to address on the merits.

MS. WHITE: Your Honor, on the issue of the Circuit Court's finding with regard to the odor of cocaine, that goes back to Ms. Manuelian's explanation to the Court that there was great confusion about what Sergeant Lewis smelled and what that means scientifically. The Circuit Court found that it is scientifically impossible to smell cocaine. In this hearing, and that's why—

THE COURT: All right, Ms. White. You've got a right. Your office brings these cases in. You got a fair chance in state court. You bring them back here. I don't like it. I don't like it one bit because I think it's a misuse of my resources to come in and try to do this. You're perfectly willing to come in and take a set of facts and say, the State court was wrong.

[21] And I will analyze it. If I agree with you, then I'll rule your way and it will be up to the Fourth Circuit to rule on it,

maybe, because you wouldn't be able to appeal if I ruled your way.

But that's fine. You want to come in and take three days of this Court's time to relitigate something that the prosecuting authorities had full opportunity to litigate in Circuit Court, you just go ahead and do it and let's have a fine day. Call your first witness.

MS. WHITE: Yes, Your Honor.

MS. MANUELIAN: Your Honor—

THE COURT: Boy, what kind of judgment the U.S. Attorney's office is displaying.

MR. KURLAND: Judge

THE COURT: Particularly, particularly when you might have, if you would sit down and analyze it a different way, and you should have presented it in your memorandum, which you didn't file, when he had filed his memorandum long ago and you file a memorandum that says nothing two days before the hearing, I want to know what's happening up there or over there in the U.S. Attorney's office.

I'm furious about this, particularly because at least I look at this and analyze that it might all be academic. That shouldn't be my job. Those arguments should have been brought to me by you, that say, look, so what, so what whether he [22] smelled cocaine. May not make a difference if you find this, if you found that it was a proper search. Everything that I've said this morning you should have said in your memorandum, and said nothing in your memorandum. And you didn't say anything in your memorandum until way late because your memorandum should have been filed a long, long time ago.

MS. WHITE: Yes, Your Honor, you're correct.

MS. MANUELIAN: Your Honor, if I may. I think that I understand the Court's wanting to circumvent some of this

process and I agree that we can. And you've mentioned something about doing something incrementally.

In the state court transcript, the mechanic basically testified in response to questioning on direct that he notified his service adviser that he had found something unusual during repair of the fuel compartment. And it never went beyond that in terms of what was—

THE COURT: What are you going to find? Are you going to find a suitcase? What you're going to find is a secret compartment.

MS. MANUELIAN: A secret compartment. And the sergeant will testify that the information that was relayed to him was that there was a hidden compartment in the vehicle. If that's the only supplemental fact we need to clarify that wasn't clarified in the state level—

THE COURT: I don't want to argue your case for you. [23] But analyze it that way.

MS. MANUELIAN: Your Honor, I think that we may have—

THE COURT: You've got to make a judgment. How I'm going to rule, and I've given my tentative view. Mr. Kurland's a good lawyer, he may persuade me to the contrary, in which case you could present your other evidence.

MS. MANUELIAN: Your Honor, I think that we can avoid going through the other the evidence if we can supplement the record.

THE COURT: Let me ask you this. How much of this, and again, I didn't do this because you all didn't and I finally thought I'd wait until the hearing.

Does your case rise or fall on this or is it the fact that everything you learn later allegedly is tainted by what essentially is the illegal search at the, you know, at the body shop.

at the service dealer? I mean, if that, maybe you ought to exercise judgment whether you need what came out of that stop that day.

I understand Mr. Kurland's position is everything is tainted because it really started, I gather, with Sergeant Lewis looking in the car where the mechanic says there's something suspicious there and is holding the car in a bailment. If that's the law of taint, I need to be persuaded of it.

MS. MANUELIAN: No, Your Honor, we have ample evidence [24] and Agent Rivello can testify at length about that.

THE COURT: I don't want to hear it. I want you to exercise judgment as to whether or not you should be spending three days of this Court's time, prosecutorial and defense resources in litigating something which is academic, which you really don't need.

MS. MANUELIAN: Your Honor, we don't agree we should be spending three days worth of court time. We never did. And we don't believe, based upon, and I think there was alluded to in the motions response, that there was ample evidence beyond just this stop. So all we're asking the Court to do is to—

THE COURT: What I'm asking you, if hypothetically I were not to find the entire investigation tainted, in the exercise of good judgment would the U.S. attorney present evidence from the stop that occurred on July 13, 2000?

MS. MANUELIAN: Assuming Your Honor ruled that the stop was, had probable cause, yes, we would, because the evidence is significant in terms of the fact that there are drugs found and large quantities of money.

THE COURT: So this is, this is evidence which you think you need in your case?

MS. MANUELIAN: Yes, Your Honor. We think we need this evidence in the case. But we agree that --

THE COURT: No. That is the threshold question because you might step back and say, look, this has been a [25] three, four year old investigation, this is simply one incident that occurred, you know. The judge may find that there was probable cause for it, but that injects risks in our case. So therefore, in the exercise of good lawyerly judgment, we're not going to present the evidence.

And if that was going to be your judgment, I would be furious that you had spent my time making me make the probable cause determination.

MS. MANUELIAN: Your Honor, if that were our call, we would have notified the Court of that a long time ago. We think this evidence is significant because it's very consistent with the cooperating witnesses who are going to be testifying about the transport of cocaine for Mr. Seldon in hidden compartments in vehicles.

And the fact that Mr. Seldon himself was actually stopped in a vehicle with hidden compartments in which there was cocaine is a very significant piece of evidence. So that's why we're pursuing it.

And we think that there's sufficient amount of information in the record now for the Court to make the kind of ruling that would say that there was probable cause, whether, regardless of whether or not you make the finding—

THE COURT: Let me hear the government's position on, assume that all the officers were told was that there was something suspicious by the car dealer. How do you then analyze the [26] legality of their looking into the car to find the compartment? Tell me, spin that out for me. Tell me what authorities you have.

MS. WHITE: Your Honor, if Sergeant Lewis arrives on the scene with only the knowledge that there's something suspicious in the vehicle and he is not given more specifics as to what that suspicious thing is, then the government's position would be that that alone is not detailed enough to assist him in the subsequent stop.

But if he is told there's something suspicious and he makes observations of the vehicle that don't require his participation in disassembling the vehicle to some degree to see these compartments, or if when he arrives at the dealership he is told, we found a compartment here and there, then those two circumstances, combined with what he observed at the traffic stop, the government believes would be sufficient probable cause.

THE COURT: All right. Obviously, there are factual things I've got to hear. I'm not going to—I've obviously indicated some views, at least preliminarily, without having had full argument, I'm inclined to disagree with the Court of Special Appeals' analysis so that it's not fair to Mr. Kurland to not allow him to do whatever cross examination he wants of anybody.

MR. KURLAND: Your Honor, I'm sorry. But I'd be very

* * * *

[68] distance learning centers throughout the state. I'm currently doing that.

Q Let me direct your attention back to October of 1995, October 29th of that year.

MR. KURLAND: '99, Your Honor.

Q I'm sorry if I misspoke. '99. Were you working that day?

A Yes, ma'am, I was.

Q And what was your assignment that day?

A I was assigned to the Traffic Operations Section but I was at the Salisbury barrack doing paperwork.

Q Did there come a time that you were contacted for assistance at the Salisbury barrack?

A Yes, ma'am.

Q Can you describe for us what happened?

A Your Honor, a phone call came into the barrack and I was asked to pick up a line. When I picked up the line, it was a Wicomico County sheriff's deputy that I'm familiar with, Carson Wentland, he's a detective there. And he had told me he got a phone call from the Pohanka Mazda dealership in Salisbury, and their service technicians had been doing some repair work on a van and they found something suspicious inside the gas tank. And I said, what do you mean suspicious. He said, apparently a false compartment but they want me to come take a look at. He said, Mike, I have no idea what I'm looking at. Can you meet me down there? I said, I'll meet you there in five minutes.

[69] It's about two and a half to three miles south of the Salisbury barrack on US Route 13 in Salisbury, just south of Zion Road.

Q If I could ask you, Sergeant Lewis, to just scoot your chair a little bit closer to the microphone. I want to make sure that everyone can hear clearly.

Can you tell us approximately what time you received the phone call from the deputy?

A Right around 4:30 in the afternoon.

Q And how long after you finished that conversation with the deputy did you leave your location at the barracks to meet with him at Pohanka?

A I told him I'd meet him there in about five minutes. In about five minutes I was there.

Q And can you please describe for us what you observed when you arrived at the dealership?

A Your Honor, I got there right about the same time the deputy did. And he and I met with the service manager, I believe his name was John Fiscus. And there were other technicians there. But I remember one because I graduated from high school with him, a guy named Bruce Willey. And I hadn't seen Bruce since high school, as a matter of fact.

And we went in to the service bay there. They brought the van in. And they directed my attention or our attention, myself and the detective's attention, to the right front seat area. [70] And they showed us a false compartment in the gas tank.

Q Now, in observing that false compartment, did you take any action, touch the vehicle in any way to observe that false compartment?

A Yes, ma'am, I did.

Q What did you do?

A Actually got down on my knees into the right front seat area where the floor was, to better look at this compartment. The compartment, Your Honor, was modified in that when you removed the front two bolts that held the seat in place, the seat had been modified and been placed on a steel plank, and it was hinged with a piano hinge on the back of it. And when you grab the front portion of the bucket seat and pulled it upward, it would hinge on the back like this and allow you to look inside the gas tank which was located beneath the right front bucket seat and the right middle bucket seat of that particular type minivan, which was a Mazda MPV, 1998 model. It had leather interior. It was a nicer model MPV.

Q Sergeant Lewis, you testified about removing bolts. Did you remove the bolts to access that compartment?

A I don't think I removed them at all, ma'am. No, sir. I'm really not sure whether I did. But I'm almost certainly I didn't. The bolts were either already removed or they were loosened because they actually took me to the seat first and

pulled the seat back up so I could see it. That's when I got in [71] to look at it closer. I didn't have any tools at all to remove the seat. I certainly don't recall removing tha seat. I didn't have any tools.

Q In your 19 years of experience, how often had you seen a compartment such as the one you've just described to the Court?

A Your Honor, I had never seen any compartments in a gas tank of a Mazda MPV. I've found many compartments in the MPV's. They're generally in the rear cargo floor, inside the seat cushions, the left interior side wall behind the driver's seat, or the dashboard. But this was the first time I'd ever seen one inside the gas tank of a Mazda MPV.

Q After you observed this first compartment, what, if anything, did the employees there at Pohanka show you next?

A They said, well, that's not the only one, there's something behind the fuel pump. I said, a second compartment? They said, yes, sir, right beneath the seat.

I then stepped up, walked back. They had opened the right door, right middle door. And when I looked down in there, I said, show me what you're talking about. And they pulled the carpet mat. It wasn't the carpet on the floor but it was the carpet mat that went around the bucket seat. And when they pulled that back, I could see a cut or a seam in the carpet. And when you pushed down with your fingers in the carpet, they showed me a steels plank. I got down there closer to examine it and couldn't see really what I wanted to see. So I asked for a [72] straight edge screwdriver and I stuck it into the crack to pry it up some and then I could see it was a stainless steel vault built beneath that seat as well. But it was unlike the front seat. This was electronically and/or hydraulically controlled with two pistons connected to the portion of the seat, and I couldn't get into that one.

Q Now, when you describe the pistons associated with this compartment, did you actually observe those pistons?

A No, ma'am, I did not.

Q How do you know or what made you think they were pistons associated with this second compartment?

MR. KISRLAND: Objection.

THE COURT: Overruled.

A Your Honor, I've seen these pistons hold seats in place in the past. But beneath those seats would be a false floor, not a gas tank. So I knew because this seat wouldn't budge, it had to be held in with these pistons or electronic trunk locks. I've seen it both ways. But I believed them to be pistons.

Q With regard to this second compartment, did you make any observations regarding any bolts near the second compartment?

A Yes, ma'am.

Q Can you describe what you saw?

A Your Honor, these bolts weren't scarred up, weren't marred up like the front bolts on the right front seat. These bolts had actually been welded to the steel plank that held this

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[83] fabric softener sheet coupled with the air freshener, i started smelling a very distinctive odor that I've only associated with cocaine in the past, Judge. That's all I've ever associated the odor with, large cocaine seizures. It was a very distinctive odor. It was coupled with the air freshener and the fabric softener sheets.

But I started looking around the van after I started smelling it and my thought was, it's got to be in this bag.

When I got his driver's license and I saw Ronald Lamont Seldon on his driver's license, it hit me then, this is the guy that brought a White MPV into Pohanka Mazda dealership. I confirmed with the task force that he is a large drug dealer in the Salisbury Wicomico County area. In fact, the whole lower

shore I was told. And then it hit me, this is probably the same van. I certainly wouldn't recall the tag number.

But I later confirmed that it was, in fact, the van, based on the VIN number or vehicle identification number. But it was a different tag on the van at this time.

I was putting two and two together. That's why when I went back to my car, I called the Wicomico County Narcotics Task Force. I knew they were working him. They told me that the day I checked the van at the Pohanka Mazda dealership. And I didn't want to mess up any ongoing investigation they had. That's why I went and called them up.

That's what I did. I called Sergeant Mike Kenhart who at [84] the time was a supervisor—

MR. KURLAND: Your Honor, I'm going to object to the narrative right now.

THE COURT: That's all right. I'd have to hear it one way or the other, just saves some time. Go ahead.

THE WITNESS: I knew that Sergeant Mike Kenhart was the task force supervisor. When I called the task force, he didn't answer, but I asked for him immediately.

When he got on the phone, I said, Mike, you'll never guess who I got stopped. I said, you probably will. And he said Peewee. Well, unbeknownst to me, Mr. Seldon's street name on the street was Peewee. I didn't know that. I said no, it's Ronald Seldon. He said, well, that's Peewee. I said, I got him stopped. He said, where? I said, at Route 50 eastbound at White Hall Road in Annapolis. I said, it's in here. I can smell it coming from the vehicle. It's in here.

BY MS. WHITE:

Q Sergeant Lewis, based on your experience, what significance do you attach to the odor of air fresheners and fabric softeners in vehicles?

A. Your Honor, my 19 and a half years as a Maryland state trooper, I've probably accessed between 6 and 800 electronically and/or hydraulically controlled compartments. In almost every case without exception, pine tree air fresheners and fabric softener sheets are the number one masking agents being used to [85] wrap up cocaine, marijuana, heroin. And in addition to wrapping up the actual controlled dangerous substance itself, they will hang pine tree air fresheners throughout the vehicle to mask the odor-, not from me but from a drug-sniffing canine.

Q Now, you've indicated that there was a distinctive odor which you associate with large seizures of cocaine. Can you describe with any greater specificity what that odor is?

A Your Honor, if I could answer it in a one liner it would be cocaine itself. It's got its own unique smell. I've never smelled anything quite like it. But if I were to break it down for you, Your Honor, I would combine it with a mixture of maybe ether, fuel, maybe a pharmaceutical odor, kerosene.

If you've ever walked into a morgue, that odor that you smell when you walk into a morgue, it's got its own unique odor. It's something I've never smelled before other than with large cocaine seizures. When I find a lot of coke, I'll have that smell almost all the time.

I can't tell you when I've seized a pound or more of cocaine where I did not have that smell. That's the only way I can describe it, sir.

Q Now, the other observations that you made of Sergeant Lewis, the deep breathing—I'm sorry—of Mr. Seldon, the deep breathing, failure to make eye contact, and the sum of money, do you attach any significance to those observations based on your experience?

[86] A Yes, ma'am. Your Honor, in singular presence, one of those would not mean a thing to me. But when I started seeing all these in aggregate or in totality together, coupled

with the fact that I smelled a distinctive odor of cocaine coming from the vehicle, mixed with fabric softener, mixed with pine tree air fresheners, I strongly felt without a doubt I definitely had it inside the vehicle at that point in time. I had a large amount of cocaine, yes, sir.

Q Sergeant Lewis, it is correct that you have—let me ask. Have you ever made a seizure of cocaine and not smelled the odor of cocaine?

A Yes, ma'am, I have.

Q And under what circumstances is that?

A It would depend on how recent the cocaine had been manufactured, how long it had been sitting in a warehouse.

MR. KURLAND: Objection, Your Honor. He's speculating at best. When something was seized, how long it's been sitting around. How do you factor that into the equation?

THE COURT: I don't know. He's the one saying it so we'll find out from him.

MR. KURLAND: Yes, Your Honor.

THE WITNESS: In every case, Your Honor, I would ultimately smell that distinctive smell, whether it came when I was actually testing with a Becton Dickinson field test kit to confirm whether it's cocaine, I would always smell that smell [87] eventually, but not initially when I search a vehicle, absolutely not. There have been many, many times when I have searched a vehicle and never smelled cocaine.

Q Sergeant Lewis, on July 13th, 2000, did there come a time that you did turn your camera on?

A Yes, ma'am.

Q And as a result of that, from the time you turned the camera on until the incident was over, were your words and actions and those who assisted you on the scene, were those recorded?

A Yes, ma'am, they were.

Q And have you provided to me a copy of the original tape of that incident.

A Yes, ma'am, I have.

Q Have you also had occasion to review what I'm going to show you here is Government's Exhibit Two?

A Yes, ma'am, I've reviewed this this morning.

Q And that exhibit is a transcript of the audio portion of your encounter with Mr. Seldon, is that correct?

A Yes, ma'am, it is.

Q And is it substantially correct in terms of what occurred and what was spoken between yourself and Mr. Seldon?

A Yes, ma'am, it certainly is. There's only one item I saw on here, when we refer to K-9's, Trooper Chris Force, F-O-R-C-E, as opposed to Trooper Chris Ford, F-O-R-D. But they sound the [88] same, especially with my Eastern Shore dialect.

Q Your Honor, at this time I would request permission to play the tape of the traffic encounter with the aid of the transcript.

THE COURT: How long is it?

MR. KURLAND: Twenty-two minutes, Your Honor.

THE COURT: Forty-two?

MS. WHITE: Twenty-two.

THE COURT: Why don't we watch it and then we'll take a very short recess when it's over. So it's 20 of. Mary, why don't you come on back at ten after? There's no reason for her to be here when we're watching, right? I'm just going to give Mary a little longer break.

MR. KURLAND: Absolutely, Your Honor.

THE COURT: Okay.

(Tape played.)

THE COURT: Unless somebody needs a break, let's keep going.

BY MS. WHITE:

Q Sergeant Lewis, with regard to the video that we just saw, can you explain to us what the terminology "Annapolis 729" means?

A Your Honor, 729 is my car number.

Q And when you indicate or the dispatcher indicates to you that he has seven current, what does that mean?

[89] A That means seven current points on his driving record, Your Honor.

Q During the videotape, one time we heard you ask or say, can I talk to Kenhart, please. Who is that?

THE COURT: He's already told me.

Q And were you talking on your radio or cell phone at that time?

A My cell phone.

Q Also, there is, early in the videotape, a portion where you are speaking, describing that you just left the Waterloo barracks, you're on your way home, etc.?

A Yes, ma'am.

Q Why did you include that information?

A Your Honor, I wanted to narrate to you, if you will, that I had been riding the assistant attorney general around that day, Sharon Benzil McCann. She had newly come on board with the Maryland State Police and she wanted a better perspective as to what we do out there on the highway. She was actually a ride-along that day. But due to inclement weather we got rained out.

Q And this information that you provided, how does that relate to the fact that your camera was not operating the entire time?

A Because I had shut my camera off because of bad weather, after she rode with me and I was heading home. And

I wanted to [90] let the courts know that that's why my camera wasn't running when I initially stopped the vehicle.

Q Now, later in the tape, you indicated that you were ocean king. What does that mean?

A Okay.

Q At one point, you were still on the cell phone talking with, is it Detective Kenard?

A Sergeant Mike Kenhart?

Q Sergeant Mike Kenhart?

A Yes, ma'am

Q And you indicated to him that you smelled what you believed to be cocaine. I believe, you stated, I believe it's cocaine but I can't swear to it. Can you tell the Court what you meant by that?

A Figure of speech, Your Honor.

Q Did you, at the time that you were talking with Sergeant Kenard, have any doubt about what you were smelling?

A No, ma'am.

Q And what is your basis of experience to determine what you were smelling?

A In several hundred drug arrests I've made over the years, Your Honor, well over a hundred of those have involved large amounts of cocaine, in excess of a pound or more, up to 39 kilos of cocaine on one traffic stop. And it's a smell that I've only associated with large cocaine seizures. That's the only way I [91] can describe it.

Q Initially, you indicated to us that you approached on the passenger side. But we saw on the videotape that you also approached on the driver's side?

A Yes, ma'am. That's when I returned to ask him to step out of the vehicle.

Q Did you make any observations of odors at the time that you approached on—

MR. KURLAND: Objection.

THE COURT: Don't lead here.

BY MS. WHITE:

Q What observations, if any, did you make when you approached on the driver's side?

A When I opened the driver's door, actually opened with my left hand to help him get out, I smelled that same distinctive odor, Your Honor, coming from the driver's side at that time.

Q Now, later in the videotape you indicated that you, I think your words were, "I can see multiple packages were loaded." Can you describe for the Court what those packages looked like as you observed them in the compartment?

A Yes, ma'am. Your Honor, the compartment was lined with stainless steel walls, reflective walls. And when I looked down in the compartment with a flashlight, I could see multiple packages but it looked a lot more than what it really was. There were three large Saran Wrap packages and I thought it was [92] a lot of kilos as opposed to the three large packages.

Q Did there come a time after the roadside inspection that you had an opportunity to see the packages outside of the compartment?

A Yes, ma'am.

Q And can you describe for us how those packages were wrapped?

A Your Honor, they were wrapped in--the cocaine itself was in a large freezer bag, Ziploc freezer bag, a large freezer bag. It was then wrapped with Saran Wrap, fabric softener sheet. There was a liquid-type detergent that I thought because of the smell was laundry detergent, and I still think that's what it was, I really don't know, also wrapped around these packages, then wrapped with Saran wrap again. That's how all three packages were.

Q And when you had an opportunity to see the packages outside of the compartment, was there any odor associated with--

MR. KURLAND: Objection.

THE COURT: Rephrase.

BY MS. WHITE:

Q What odor, if any, was associated with those packages?

A The odor of cocaine and air freshener and fabric softener and sheets all in one. That's the smell I smelled on the packages.

Q Other than the actual packages, the three large packages [93] that you've described, were, did the second compartment contain any other items?

A There were nine pine tree air fresheners inside the second empty compartment and twelve pine tree air fresheners inside the compartment with the contraband.

Q Now, with regard to the compartment where you actually found the packages, you've indicated there were packages and air fresheners. Do you recall anything else being in that compartment?

A Yes, ma'am, I do.

Q What else was in that compartment?

A Your Honor, there was a socket wrench. There was only one socket wrench with a socket on the end of it that fit the front seat bolts to open that first compartment.

[94] Q Now, with regard to the other areas of the vehicle, did you make any observations of air fresheners?

A Yes, ma'am.

Q And can you describe where those air fresheners were observed?

A Your Honor, there was one hanging on the left side of the driver's seat. There was one hanging by the steering column, and one hanging down by the center console area. There were actually three pine tree air fresheners inside the vehicle and a total of twelve in the first compartment and nine in the second compartment.

Q Once the packages were removed from the compartment, what, if any, observations did you make with respect to odor associated with that compartment?

A That was the odor that I was smelling on the roadside, what I smelled coming from those packages.

Q Thank you, Trooper. Nothing further.

THE COURT: Mr. Kurland. You might as well question from there, in accordance with the usual practice.

MR. KURLAND: Yes, Your Honor. Want me to go right into it? Because I'm going to be quite sometime, Your Honor.

THE COURT: Go right into it.

CROSS EXAMINATION

BY MR. KURLAND:

Q I want to use the podium, if Your Honor please. Trooper Lewis, let's start out with the October the 29th, 1999 Pohanka visit. You with me?

A Yes, sir.

Q Okay. You got a telephone call from a member of the Maryland State Police, Wentland, who told you that he had gotten a call from Pohanka dealership about a suspicious object in the car, correct?

A No, sir.

Q You got a tell—you got a telephone call from Wentland, did you not?

A Yes, sir.

[95] Q To summons you to Pohanka, did you not?

A Yes, sir.

Q And as a result of that, as a result of being summonsed, you went there, didn't you?

A Yes, sir. He's with the sheriff's department.

Q Okay. He's with the sheriff's department?

A Yes, sir.

Q Okay. And when you arrived, you met him where?

A At the Pohanka Mazda dealership.

Q Where?

A On the east side of the building.

Q And when you got to the east side of the building, you then walked outside on to a lot, didn't you?

A We walked inside to the service bay area.

Q And then you walked outside on to a lot, didn't you?

A I don't recall, sir.

Q You don't recall that.

A We actually met on the lot before we went inside.

Q Isn't there a lot at that dealership for cars that had been completed to be picked up?

A That I don't know, sir.

Q And isn't that the lot where you met the gentleman from Pohanka?

A I met him on a lot. I don't know if that was the particular lot where vehicles are put to be picked up.

[96] Q And at that point in time on that lot, you instructed who happens to be Mr. Wiley or Willey, whichever the case might be, to drive the vehicle inside, isn't that correct?

A I don't recall instructing anyone to drive the vehicle inside, no, sir.

Q Well, was the vehicle outside?

A That I don't recall.

Q You don't recall whether the vehicle was inside or outside?

A I know it was brought into a bay. I don't recall where it was outside or exactly where it was. I really don't recall, sir. I'm sorry. I don't recall.

Q Don't be sorry. The vehicle was driven in?

A It was, yes, sir.

Q So obviously, then, it was outside when it was driven in, correct?

A It was driven into the service bay, yes, sir.

Q Right. And when it got into the service bay, you and the sheriff went over to the vehicle, correct?

A The technicians led us to the vehicle.

Q The technicians led you—did they have to lead, since they already drove it in at your instructions?

A I didn't know where they wanted us to look, sir.

Q Did you see the vehicle come in?

A I did, yes, sir.

Q Did it stop?

[97] A Yes, sir.

Q So why did they have to lead you to the vehicle? A I didn't know where they wanted us to examine. We were there to look in an area they thought had a compartment.

Q So now you walk up to the vehicle. And a gentleman by the name of Mr. Fiscus, who happens to be the manager, is there, correct, the service manager?

A The service manager, yes, sir.

Q And then Mr. Willey or Wiley—what? Willey or Wiley? I keep making that mistake.

A Willey.

Q That's the guy you went to school with? It's the guy you've known?

A Well, I haven't seen him since high school.

Q You went to high school with him?

A Yes, sir

Q Did you know him as a liar back then?

MS. WHITE: Objection.

THE COURT: Sustained.

BY MR. KURLAND:

Q So Mr. Willey and Mr. Fiscus are standing there. I just want to try to understand your testimony. Maybe you remember this or maybe you don't. Is it your testimony that when you walked up to that vehicle, the seat had already been pushed back and the bolts had been removed from the floor?

[98] MS. WHITE: Objection. Mischaracterizes the testimony.

THE COURT: He can say no if it didn't.

A No, sir. That's not my testimony.

Q When you looked into the vehicle, tell me again what you saw. I'm talking about that seat, that front seat.

A The technicians were ahead of me in the vehicle, Your Honor. I was behind them. They had bent down. And I don't recall if they actually removed the bolts to pull the seat up or the bolts were removed on the floor. But they pulled the seat up initially for me to examine it. That they did.

Q So that's your testimony. It was the technicians that removed the bolts?

A Yes, sir, because I didn't.

Q You didn't do it?

A No, sir, and neither did Carson Wentland, the deputy.

Q Now the seat's pushed back and you look down inside and you see a well area, correct?

A I see a specially constructed compartment down in the gas tank.

Q Isn't it a well?

A It's a compartment.

Q Right. A compartment. Not a specially– it's a well or an area in the floor, right?

A It's a modified compartment.

[99] Q Right. Having seen that, you then went to the back door, you removed the carpeting, took some type of a pry or a screwdriver, and you pushed it into the floor board to try to pull up an area that you could explore, correct?

A After they led me to that area, yes, sir, I did

Q You did that. That you remember?

A I testified to that earlier, yes, sir.

Q But you don't remember the condition of the vehicle when you looked in initially, do you?

A Yes, sir, I do. It was a nice, very clean vehicle, very spotless.

Q I'm talking about the seat.

THE COURT: Don't, he's already testified to that aspect. Move along.

Q Yes, Your Honor. Once you completed the examination, you then, believing that these hidden compartments that you had seen perhaps might be some type of criminality—is that what you concluded? Because you know for a fact that the only reason to have hidden compartments in your car is because you're a drug deal or you're hiding money or you're hiding guns, isn't that right?

A Specially constructed compartments like this one, yes, sir.

Q And there's no other reason at all in the world why somebody would have a hidden compartment inside of a car, is there, unless they're a criminal?

[100] A I've never seen electronically or hydraulically-controlled compartment---

Q You didn't answer the question.

A Yes, sir. I've never seen one with legitimate items in it, never.

Q But you've seen them with nothing in them, haven't you?

A Yes, sir.

Q How do you know what was in there when you didn't see it was legitimate or illegitimate?

A Because an ion scan produced a positive level of cocaine or marijuana.

Q Sir, answer my question.

MS. WHITE: Objection.

THE COURT: You're arguing with him. Move on. And question from, I think I told you, further back. You can get in front of the table but give him his space.

BY MR. KURLAND:

Q Yes, sir. After you completed the inspection of the interior of the vehicle, you then went into the office of Pohanka and started going through records, didn't you?

A No, sir. I stood in front of the counter and they got the records for me, sir. I didn't go through any records.

Q They brought the records to you?

A Yes, sir, they did.

Q At your request?

[101] A Yes, sir, they did.

Q And in addition to the records that you had seen for that specific automobile, with Ronald Seldon, I guess the work order, you looked at other records, didn't you?

A Later on I did, yes, sir.

Q And you saw a record with the name of Derrick Shrieves on it, didn't you?

A Yes, sir, I did.

Q And you copied that information down, didn't you?

A I did eventually get photocopies of that, yes, sir.

Q And you sent that over to the narcotics section of Wicomico County as well as the DEA, didn't you?

A Yes, sir.

Q Now, that's the first time you had seen Derrick Shrieves's name, isn't it?

A Or Ronald Seldon's, yes, sir.

Q Or Ronald Seldon's name, isn't that correct?

A Yes, sir.

Q And you sent that information over to the DEA?

A Task force, yes, sir.

Q Whose name was this vehicle in? Who was it titled to in October then, on October the 29th of 1999?

A Your Honor, I believe it was a female subject by the last name of Alburg, A-L-B-U-R-G, out of Crofton, Maryland.

Q So it's not fair, is it fair to say, then, when you pulled [102] the vehicle over—strike that.

Did you have any further contact with the vehicle between October the 29th of 1999 and July the 13th of the year 2000?

A None.

Q So I guess it's fair to say, then, if you were to put one and one together, the answer would be that the vehicle was still titled to that very same person, correct?

A As far as I knew, yes, sir.

Q You found that it wasn't, though?

A Yes, sir.

Q All right. And when did you find that out?

A The day of the traffic stop, on July the 13th, 2000.

Q Let's get up to that date in time, and thanks for opening up the door for me.

July the 13th, 2000.

THE COURT: He doesn't have to say "I'm sorry" to you, you don't have to say "thank you" to him. Just ask questions.

BY MR. KURLAND:

Q July the 13th of 2000, Sergeant Lewis. You were traveling on Route 50 eastbound towards Ocean City, at least you had been heading in that direction had you gone all the way to the East Coast, right?

A Yes, sir, that's true.

Q And you got behind a vehicle that you say was speeding, doing 71 to 73 in a posted 55, correct?

[103] A Yes, sir.

Q Okay. And you followed that vehicle, you paced that vehicle for a period of, what, maybe a mile, a mile and a half?

A A little over a mile, sir.

Q Okay. And subsequently, you stopped the vehicle for speeding after you made those observations. You pulled up, saw him on the telephone, with his hand on the steering wheel. You made those observations and you subsequently pulled him over on the side of the road, correct?

A Yes, sir.

Q Okay. And you walked up to the vehicle on the passenger side because it's safer and you learned that's the way you're supposed to do it and that's what you teach the guys, right?

A I do, yes, sir.

Q And when you walked up there, at that point in time you asked Mr. Seldon for his license and registration, correct?

A Yes, sir.

Q And that's normal procedure, isn't it?

A Yes, sir.

Q The purpose of getting a license and registration is because you're going to have, in your possession, if you need it, certain information as who the driver is, if the vehicle is owned by someone other than the driver, isn't that correct?

A Yes, sir.

Q And it aids you in writing out this Uniform Maryland

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[142] cocaine coming from the vehicle.

Q Sir, I'm talking about the traps right now. Please, let's try to direct it in that attention, please. You told Kenhart that this is the same vehicle I had the traps in. You told him that before your backup arrived, didn't you?

A I don't recall that, sir.

Q Would you like me it read it? Okay.

Court's indulgence, please, Your Honor. Somewhat important that I find this. There's a segment on tape. I have no dog, Mike. Based on the traps that I know are in here—did you tell him that?

A Yes, sir.

Q You knew that the traps were in there?

A Yes, sir. Strong suspected it was the same vehicle. I was putting it all together.

Q And after you did all this dialogue and you say, I got enough to do him because this is the vehicle where I found the traps, what happens is you get backup. And you go to the front, you open the door, watch him. Go to the front, you look down, you go to the back, then you say, turn around, you're under arrest, you're under arrest, or words to that effect, you've got hidden compartments in here?

MS. WHITE: Objection. Your Honor.

MR. KURLAND: Did you say that?

MS. WHITE: Objection. It's not a question and contains [143] several things that are not facts.

MR. KURLAND: Let me read it.

THE COURT: Yeah

BY MR. KURLAND:

Q You told—let me back up a little bit, Sergeant. You told the dispatcher, start another unit on the way. I have what I believe is a false compartment in the floor. Isn't that what you told him?

A Yes, sir.

Q Okay. But you already knew that, didn't you?

A Yes, sir.

Q Why didn't you say, madam dispatcher, I'm telling you right now, I know there are compartments in this floor because back in October, the 29th of 1999, I went to Pohanka and I spotted two compartments and I know they're in there? You didn't tell her that. You said, I have what I believe are compartments. How did you make that quantum leap?

A Your Honor, sir, when I was talking to dispatcher in my car, Mr. Seldon was there as well and I did not want him to know that I had visited his vehicle at Pohanka Mazda dealership. I knew there was a federal probe into his drug distribution in Wicomico County and I did not want to tarnish that investigation.

Q Mr. Seldon's not in your car when you're bending down and one of your fellow troopers who arrives at the scene, when you

* * * *

[199] in this case. And that's not to say that he didn't, may not have thought that he smelled it.

There were two aspects of this. Number one, whether or not it could be a proper element of probable cause, plus the ancillary effects upon his general credibility, because there are other things he testifies to that are important.

Unless the government really wants to press the issue, I really don't think that, and I know of no case, and the government's cited me no case, and I really am somewhat serious about this, this is why there are K-9 units. Humans, you know, I'm not saying that cocaine does not give out a smell. I mean, I think it's obvious that it does, otherwise there wouldn't be any reason to use air fresheners to disguise the smell. And actually, the testimony about the patent was helpful. That's subjective evidence that there is a smell.

Plus Agent Rivello, I credit him. I'm not saying that cocaine doesn't emit an odor that is susceptible under some circumstances to human perception. Based upon what's before me now, I would not find that the search was justified by Sergeant Lewis's perception that he smelled cocaine. Now, it may have been justified by other things, but that would be my present inclination.

MS. MANUELIAN: Your Honor, actually we did cite a couple of Fourth Circuit cases that talk about a warrantless search based upon just the odor of marijuana coming out of a [200] hotel room. Another Fourth Circuit case talks about it being one factor. And that's, I think in this case, clearly what it was. It was a factor in combination with others. Frankly, those other factors would have been sufficient for the probable cause. I think the argument that we would put forth --

THE COURT: In the Fourth Circuit cases, was it burning marijuana?

MS. WHITE: The odor, I can't remember

THE COURT: You're too young for this. But remember

MR. KURLAND: I've never inhaled.

THE COURT: You remember Wild Bill Hagy? Memorial Stadium, used to be up in Section 33. And depending upon which way the wind was blowing, tickets to Section 32 or 34 were very, very popular. People came home, even the best baseball fans were said to have come home if the Orioles lost, said, who cares, man?

So I would, I would distinguish between a burning marijuana and the other things. It's a factor.

MS. MANUELIAN: It's a factor, Your Honor. And I think there are sufficient other factors in this case. And taking that factor and combining with the others, or even those other factors in and of itself is what the government would like—

THE COURT: And my question is, I'm perfectly willing [201] to accept the stipulation of Mr. Willey's testimony. That's fine if you don't want to call him.

And I realize that all he said was that he said to the officers that something was suspicious. I must say, based upon what I think common sense was, and it's now been laid out by Sergeant Lewis, somebody, when they got there, said, it wasn't like they just found a suitcase sitting there or something. Somebody, whether it was Willey or it was somebody else, somebody elucidated it by verbal act or by something, that it had to do with a secret compartment. I think otherwise there wasn't any reason for all of this to unfold.

That is, to me, that's what Sergeant Lewis testified to. And it would seem to me it's common sense. They didn't bring him out for a scavenger hunt.

MS. MANUELIAN: Your Honor, in the transcript it specifically, during the direct examination, the question was asked of the, Mr. Willey, after the car was pulled into the service bay, what did you do? I talked to Sergeant Lewis for a few minutes, kind of explained what I had seen, and that was basically it.

And there was nothing specific about what he explained to the officer during the redirect—excuse me—the recross examination. There was some questioning concerning what it was that he had seen actually during redirect. And he said, I advised him there was something unusual that when I flipped the [202] seat up, there was like a well there that, you know, shouldn't have been there and I stopped at that point and notified him. That's to the service manager. And then he said he advised the service manager of that when he found it during the examination.

And then on recross by Ms. Riley, she asks the question, is that the same area that you have told Sergeant Lewis about, correct? And his answer was "correct."

So Your Honor, I disagree with defense counsel. I think just on this alone—

THE COURT: I understand.

MS. BLEDSOE: That would be if you are characterizing a well as a hidden compartment. I mean, I don't necessarily characterize a well as a hidden compartment. And I know that Mr. Willey absolutely positively did not say during his testimony that it was a hidden compartment. He said that there was a well, that there was something suspicious, and because of that he notified his service manager.

And he also will testify, well, he did testify, that he was the one that was ordered by Sergeant Lewis to bring the car from the parking lot where the cars are placed when the repairs are completed, into the bay, and that he did not show Sergeant Lewis the hidden, the well, the suspicious item, that Sergeant Lewis was the one that pulled the seat back, that Sergeant Lewis was the one that undid, I'm not sure if he said undid, pulled the carpet up, and Sergeant Lewis was the one that

* * * *

[212] reported. And if he had gone out there to see in response to the report, and he did, exactly what was suspected, which was a secret compartment, and that itself would be enough.

I'm going to ask, obviously my ruling, if it sticks, is in favor of the government. But before I ask Mr. Kurland or his co-counsel to tell me where I'm wrong, is there any other factor that I'm missing from the government's point of view?

MS. WHITE: No.

MS. M.ANUELIAN: No, Your Honor, no.

THE COURT: Where am I wrong?

MS. BLEDSOE: I can address the bailment issue, Your Honor. I think factually, if I heard you correctly, you were saying that it would be okay. And the Court of Special Appeals also talks about that.

If the sergeant came to Pohanka while the repair or while the car was being repaired and, certainly, the technician said, oh, here it is, and Sergeant Lewis just leaned over and looked into it, that would be a separate case or different case than what actually occurred, which was that the car had been repaired. And Mr. Willey says that in his testimony. The car had been repaired. It was completed. It was put back together again. The bolts were screwed back. The carpet was cut back. The seat was put back. And then the car was removed from the service bay into a parking lot which was designated for vehicles that had already been repaired and were [213] waiting to be picked up.

So I think if we're talking about information given from a private party to the government and then the government's there observing that information, then the Fourth Amendment wouldn't apply.

But if we're talking about a situation where we actually have a bailment, where the work was completed, the car was

placed in a parking lot ready to be picked up, and then the government, through its own actions, brings the car back in and conducts a second search of the car, then the Fourth Amendment does apply. And if that's the situation, then we have to decide if there was a bailment, was, in fact, was there consent?

And Mr. Willey says in his testimony, absolutely not. I did not, nobody from Pohanka said, you can search this car.

Sergeant Lewis directed the whole situation. Bring the car in, I'm taking the seat up, I'm taking the carpet up, and I'm inspecting and searching the car. How can that be consent?

Now, Your Honor, if you would even find that Pohanka, just by their mere inaction, that it was consent, you have to look at, well, what was the scope of the consent? And that's what the Eldridge case talks about. And the Eldridge case says, yeah, it's okay if somebody gives consent and you open up the trunk and you look into it. But if you're pulling up the carpet, it might be a completely different story.

[214] THE COURT: But that was the carpet in—let me ask one question, which I really haven't asked myself, and I shouldn't do that sitting out here. It's a kind of radical question.

I realize under the precedence consent becomes the issue. Constitutionally, why is that the issue?

The constitutional standard is, why to find the search reasonable does one have to go through the mechanism of consent?

MS. BLEDSOE: Because if, Mr. Seldon did not have a, I would concede he didn't have an expectation of privacy when the repair man went in and did the repairs. Obviously, if he had to do the repairs and go through the pump and remove the pump and see the hidden compartment or the well, again, he talks about a well, not a hidden compartment, then Mr.

Seldon didn't have an expectation of privacy at that time and for that repair.

But the question is, once that's completed and put out into the parking lot, does Mr. Seldon then regain his expectation of privacy in his car? And if he does regain his expectation of privacy and the car's brought back and then it is re-searched by the government, I think that violates his expectation of privacy and therefore becomes an unreasonable Search.

TEE COURT: Or course, Mr. Seldon wasn't there.

MS. BLEDSOE: No, he wasn't there. But when I give my car to the dealership to be repaired, I understand that I'm [215] allowing, and I'm allowing somebody to peer into my privacy to the point of having the car repaired. And if the police officer, if the sergeant was there when that was occurring, absolutely not. I don't even think the Fourth Amendment applied. Even if it did, there would be no expectation of privacy.

But we don't have that situation. The car was completely repaired back.

I don't expect a dealership to search my car twice and to repair my car twice. They completed the repairs. The car's placed on the parking lot to be picked up. Therefore, I've regained my expectation of privacy. I didn't give them permission to let the police come in and undo the work that was already done to see what they wanted to see. I think I have a complete expectation of privacy in that car at that time. And the Court of Special Appeals does talk about that.

Given that, Sergeant Lewis, all he had to do was, Mr. Seldon we're not releasing your car, I'm going to go get a warrant or call somebody up.

THE COURT: Wait a minute. What are you going to get a warrant for? Mr. Kurland's right. The mere fact that there

might be a well or secret compartment doesn't give you a right to a warrant.

MS. BLEDSOE: But it gives them the right to search my car?

[216] THE COURT: Yeah. If in fact you have put it in the position—for one thing, the whole idea of an expectation of privacy—obviously, we know when you search cars. But it's not in a private part of the car. You send your car in to be serviced. This thing is in a place where you've got to reasonably know that somebody may see it.

MS. BLEDSOE: I agree with that.

THE COURT: But you say once it's done. But that's where I differ with you, I think. I think if, you don't recover it. It's not like, if he had been there and insisted or something, then that's a whole different involvement. But here, it's what his expectation was when he sent it in to the car dealer. And his expectation had to be somebody may find this.

I think that once it is found, there's an intervening event, whether they finish it up or not. Frankly, I think it's putting form over substance to say they can't put it back together again before the police come. The fact is they've seen it and it really is exceptionally good citizenship. And this case really is exceptionally good police work.

They come in and say, all right, here it is. They look. They do a little digging under the carpet, look, here it is. I don't, I guess what I'm saying is I understand your distinction. It's a fair distinction. It's the one that the Court of Special Appeals bought.

I think that the expectation of privacy issue should [217] be viewed at the rime it goes into the shop, that you don't recover your—you don't know what's going to go on at the shop. You know what's going to go on when you give them the car. But what happens at the shop and the sequence of

things. I don't think you magically recover your expectation of privacy.

I think one should reasonably expect that if you send something in where a public-spirited citizen is going to see something suspicious, that they may call in law enforcement officers to help them look at it. Even if the work had been finished, I would think that in terms of expectation of privacy we should live in a world whore, doggone it, you've got something that's suspicious, you give up, you send it in where it could be observed, yes, you might have a citizen informer say, I've seen this, I'm calling in the cops.

MS. BLEDSOE: And I guess my disagreement factually with you is that Mr. Willey only saw something suspicious and it was a well. He did not see a hidden compartment. He obviously didn't see the second hidden compartment. I mean, that was completely found by --

THE COURT: Well, the evidence is in on that. And I find whatever Mr. Willey said, and this did cause me concern this morning before you got there, because all the Court of Special Appeals opinion said they saw something—I'm absolutely persuaded that Sergeant Lewis was, they explained to him, we've got something here which we think is a secret [218] compartment. That's the only thing that explains why they brought the car in, what they're looking for. So that, in fact, it wasn't just, quote, "something suspicious." It wasn't just a well. The course of conduct, what he was told, was we suspect something here, which is secret compartment.

So I understand your point. You won in the Court of Special Appeals on that issue. You've lost here.

What about, even if he shouldn't have looked, the relevant thing is what he knew he at least would have known. Clearly, the car dealer was entitled to call him. Clearly, he was entitled to go to the car dealership. They explained to him what it was that I find as a fact gave rise to their suspicion that there were hidden compartments.

For purposes, does that so dilute his knowledge in July of 2000 that it can't be factored into the probable cause determination that now he's got somebody very nervous, lots of air freshener, known subject of a drug investigation, money, a wad of money, add to that a citizen complaint, no reason to lie, called me in, explained to me why it was that they were suspicious, that there was a secret compartment.

MS. BLEDSOE: And I think probably Mr. Kurland will talk to the other factors. Again, Your Honor, my position as to the secret compartment is, of course, there wasn't a secret compartment. It wasn't conveyed there was a secret compartment.

And I believe that in both Eldridge and in the Brock [219] case, if you see something, you're right, there's no expectation of privacy. But if you take something apart, there is an expectation of privacy.

THE COURT: No. No. Let's assume that that was illegal. Let's assume that his looking for it was illegal. He still knew—you can excise that—he still knew that he had been called in and somebody reported to him what suspicion, which on the facts I find to be suspicion of secret compartment.

MS. BLEDSOE: And I think it weakens the entire probable cause argument because I think, and I know Mr. Kurland's going to address those other factors with you. But knowing that there's a compartment in a car and having a suspicion or a hunch that there's something suspicious in the car, to me in a very close probable cause case, which this case is, weakens the government's position and actually strengthens our position that, in fact, there wasn't probable cause at that time to do the search.

THE COURT: Mr. Kurland.

MR. KURLAND: Thank you, Judge, and I will be brief. Thank you. I know you want me to be brief.

THE COURT: No. No. I appreciate that. I do this because when I practiced law, I'd much rather know what was on the Judge's mind so I could address his or her weakness of reasoning.

MR. KURLAND: Your Honor, we do know this. Backing up [220] the tape, if I could just steal a little of my associate's thunder here. We do know for a fact that when Sergeant Lewis went to Pohanka and subsequently after that observation, the observations that he made, went into the office, he made a determination that the vehicle at that time was owned by a lady by the name of Alburg, not Seldon.

Now, he expects you to believe, I think, Your Honor, that some eight months later, when he gets the car and he's told that Yvonne Seldon is the owner of the car, that it didn't make a difference whether it was you Alburg or Seldon, that the bottom line is, there's compartments in there.

THE COURT: Wait a second. On this, I thought, and maybe I'm wrong, I don't know whether I picked it up in the testimony this morning or from the opinions I read, that not only was he told who the owner was, but who brought it in.

MR. KURLAND: He was told who brought it in.

THE COURT: The name he recognized wasn't Yvonne Seldon. The name he recognized was Ronnie Seldon.

MR. KURLAND: Ronald Seldon. He recognized that name. But because he recognized the name, should you infer that he recognized the vehicle? It was already, it was already in someone else's name, Miss Alburg. And now there's quite a quantum leap, when he's given the registration and this vehicle says Yvonne Seldon, how you can put the two together and say, that's the same car.

[221] THE COURT: What he put together was that he knew the name Ronald, Ronald Seldon was the one he had had a hit with the Wicomico task force.

MR. KURLAND: Yes.

THE COURT: That's the name that hit back in October of 1999, and that's the name he recognizes.

MR. KURLAND: Right. And he recognized the name, but the question is, did he recognize the car? Now, I really don't know. And I don't think you can if it was Yvonne Seldon who's the owner when he sees it in September and it's Yvonne Seldon when he sees it in July, then perhaps you can make that inference.

But I think, Your Honor, when there's some other owner to the car and now there's a different owner to the car, I don't know how you can tie together that association.

THE COURT: He obviously thought that this car had- - your very point that he went and pretended to be a very smart guy in front of his troopers. He knew darn well there was —

MR. KURLAND: Judge, let me also say this in support of our position.

Whether it's the State of Maryland under the case of Charity v. State or Minolfo or Snow or you're talking about the cases of Mendenhall or Royer, I honestly think, Your Honor, those cases stand for the proposition that if you stop someone for a violation, you can't detain that person any longer than to [222] justify the initial reason for the stop.

We know, Judge Motz, that Sergeant Lewis called in a name, Soundex number name from a driver's license. The person had a valid license. We know for a fact that there were no warrants. We know for a fact the vehicle was not stolen. All of those determining factors were made one minute after the stop.

It's the obligation, the way I understand the law, unless there's additional probable cause or unless there's a consent for the person to remain at the scene and allow the police officer to continue doing what he's doing, there was no

consent in this case, I mean, there's self-serving probable cause that comes forward, he's scared to death, but Judge, I don't think that's enough to justify a second detention that lasts for another 25 or 30 minutes.

There's an obligation here of Sergeant Lewis to write out the ticket, give him back, give him back, and he wrote out the ticket, give him back the warning and send him on his way unless there's something more.

This is the more, Your Honor. One minute after he gets in the car and he's talking, he says, Mike, he's scared to death. Nothing else. I got enough to do him.

Judge, there's nothing. He's scared and I got enough to do him.

THE COURT: But that's not all he had. He knew, he [223] knew the relevant—it's about five factors, putting aside the smelling the cocaine.

Knowledge or suspicion of secret compartment. He knows that Seldon is a subject of a task force investigation. He has seen the money. He's scared to death. And he smells a lot of air freshener. That may or may not constitute probable cause. That is a very fair question. But he knew all of that by the time he had come back to write the ticket.

MR. KURLAND: Judge, you observed the tape. I know, I saw you looking at the tape while it was playing. Mr. Seldon is out of the car, Judge. He's looking directly at the police officer. He's responding to the officer's questions.

Do you really think, based upon what you saw, that Mr. Seldon was scared to death? I don't know how, how you can reach that conclusion. The man is talking to a police officer on the street and when the tape's not running, you got the carotid artery, you've got the chest palpitating. You've got this severe nervousness, scared to death.

But when Mr. Seldon is on camera, and I don't even think he knew he was on camera, they didn't make it known at that time, Mr. Seldon is saying, sir, I'm not nervous, why are you saying I'm nervous? He looks him right in the eye. He's answering his questions. He's not acting in a state that would indicate that somebody, shuffling the feet and all these characteristics that I wanted to get into.

[224] But the bottom line is, Mr. Seldon is responding like a normal citizen would respond. Where did you clock me? He wants to try to explain, he wants to try to justify. That isn't the behavioral pattern of somebody that's pulled over that is involved in a criminal interdiction type of stop.

I suggest, Your Honor, that that—Judge, a picture's worth a thousand words. That photograph of Mr. Seldon being videotaped, meeting the situation head on, not acting like somebody that's—judge, scared to death. Judge, that's more than a figure of speech.

I mean, that seems to be the answer here. It's a figure of speech. When it doesn't make sense, it becomes a figure of speech.

He even wrote down, as you pointed out, tense, somewhat nervous. That's not a figure of speech. There's a big difference between that, Your Honor.

There's also the issue, Your Honor, when he says, when Sergeant Lewis says, Mike, this is the van that I got the two compartments. But they're not illegal, as the Court has already pointed out. So I know right, right now, that's enough probable cause in and of itself.

Judge, there's no way in the world that Ronald Seldon is going to be able to leave that scene. There's no way in the world Ronald Seldon is going to be able to drive away. There's no way in the world that Sergeant Lewis is going to give him back his driver's license or a ticket.

Sergeant Lewis says, look, I've got a couple of things here with the compartment, whether it flies or it doesn't. You know something? I'm going to search this car. If I'm right, I'm going to look like a hero. If I'm wrong, Mr. Seldon's going to be the happiest guy that I let him go.

I think, with all due respect, Judge Motz, I would ask you to reconsider your position with what you factored into these equations and the behavior because, frankly, Judge, all this was simply was an inchoate hunch of Sergeant Lewis that, you know, what do I have to lose?

Judge, obviously, I wouldn't be here asking you to reconsider if, in fact, these things were consistent. But you see, you've got to look at the credibility of Sergeant Lewis. It's really a factor in this case. Is he embellishing? Is he piling on? I suggest, Your Honor, that he was. Just to say at the very beginning, Mike, I got him, I got enough to do him, Mike, that's probable cause in and of itself. That's a mindset.

Judge, it doesn't make any difference whatsoever, Sergeant Lewis was going to search that car whether anybody liked it or not and I'll deal with it later on. So I'll put together an eleven page report and I'll be able to justify it.

He's the best I've ever seen. He is truly experienced, very competent. His testimony under normal circumstances, Your Honor, would be so acceptable I wouldn't be [226] able to even put together an idea or a thought pattern how to cross examine him. But how many cases have you seen—I haven't seen that many in my experience—how many cases have you seen where a tape is running? And a tape is running—

THE COURT: I assume from now on we're going to see a lot. Or at least you all are.

MR. KURLAND: I bet you are.

THE COURT: No. I mean, I think under the consent decree.

MR. KURLAND: We had the benefit. We had the benefit of seeing a tape in this case. And I think, Judge, we're talking about 0 and 180 degrees when you look at the tape versus the testimony that you're hearing. All of the self-serving testimony that Sergeant Lewis shouldn't amount to probable cause because it's only self-serving. I don't want to—Judge, it was a fait accompli. When he went into the car and turned on the tape, I got enough to do him, Mike, I mean, this is enough probable cause for me. I know I got enough probable cause.

It really shouldn't come down to whether Sergeant Lewis, Your Honor, thinks that he has enough probable cause because he didn't under those circumstances. And to leave these determinations up to sergeants that say, I got enough to do him in five seconds, and it's enough probable cause for me, and nothing more other than self-serving statements.

Judge, with all due respect to Sergeant Lewis, I think [227] he was somewhat disingenuous with the Court. I'm not going to go beyond that. But I honestly think he was somewhat disingenuous with the Court when he made the self-serving statements that he made. And once again—

THE COURT: No. No. He's skillful. You're fair. He knew the tape was on. Others didn't. He was, he was very, very clever in the way he let his fellow officer know the tape is running. I'm not naive about this.

MR. KURLAND: Judge, how about that other thing, when he gets down? Judge, he really wants, he wants to be put up on the pedestal, so he says what he wants to say when it benefits him.

Judge, what about this thing at the roadside when the guy says, gosh, I'm impressed, how did you know that was there? Judge –

THE COURT: A, the answer to that is twofold. Number one, there's a perfectly good reason not to let anybody know.

A good law enforcement rule, don't let people know more than they need to know.

Secondly, that might prove that he's a braggart. At worse it proves, it doesn't prove that he's lying in court. It proves that maybe he enhances his own reputation with a fellow officer. But in fact there's a perfectly good reason anybody, I suspect, who's been involved in law enforcement or in defending law or in anything that's confidential, you don't tell people [228] things they don't need to know.

MR. KURLAND: If he would do that to a fellow police officer, Your Honor, I think he would try to do it to the Court, and I think he would try to take facts and manipulate those facts as I suggest, with all due respect, he did today, try to persuade you that it's all black and not white.

And I think, Your Honor, there are definitely shades of gray in this case. It just, it just brothers the heck out of me when somebody says, five seconds into the show, the show's over. I got enough to do him.

THE COURT: But by that point, he either did or he didn't. I mean, doesn't it show his good faith to some extent that he was willing to, he was open to getting the dog. Maybe he should have thought - maybe his friend, his friend may have had a better view of the law than he did, that a dog alert was—

MR. KURLAND: Do you know why he wanted a dog? If you look at the transcript from Anne Arundel County, he didn't get the dog there to confirm or verify the fact that he was trying to smell cocaine. He brought the dog there to try to, this goofy thing. He tried to find another compartment on Route 50.

If you look at the transcript, the dog wasn't brought there. See, he's too smart for that. He wouldn't say, I could smell the definitive odor of cocaine so to prove it to myself I had to

bring in a dog. He says in his testimony under oath [229] before Judge Loney, they weren't brought there because I wanted to confirm what I suspected, because he was already beyond that. He was absolutely, positively certain. He testified, I brought the dog there to find other compartments on the highway.

Judge, the car wasn't going anywhere. I got enough to do him. I'm going to book him.

THE COURT: Were the dogs finally brought? According to what I've heard, the dogs, the dogs never got there.

MR. KURLAND: No, they couldn't find a dog. Chris Ford or Force wasn't available. Another unit wasn't available. But they were trying to get the dogs there. And when I say, and I said to him, what did you need a dog for, Sergeant Lewis, if you know that smell, and it's a definitive odor, even though he tried to minimize it throughout, a definitive odor, I think I can smell it, I know I can smell it but sometimes I can't smell it, it's like a Jackie Mason type of thing, it really is.

But the bottom line, Your Honor, is he brought the dog there not for the purposes of confirming his suspicion. He brought the dog there, according to his testimony, to find another compartment. I could pull out the transcript and show it to you. That never came up. But it's certainly something that you should consider when you're going to weigh in everything as far as Sergeant Lewis is concerned.

Judge, you know, if it fits, if it fits, I tell you, he's going to put it right there.

[230] Judge Motz, you got to be a little bit smarter not you. Making a general statement.

THE COURT: No. I understand.

MR. KURLAND: You got to be a little bit smarter to see that all this self-serving testimony doesn't really amount to a hill of beans, as they said. It really doesn't. And the bottom

line, Judge, is if you really take the time to read this transcript, really go through this transcript, you're going to see that it's plagued with inconsistencies.

THE COURT: I'm not going to read. I'm not reading, what's his name's transcript's not before me.

MR. KURLAND: I'm making a statement. The only thing you're going to read is Dr. Cone.

THE COURT: I'm not going to read that.

MR. KURLAND: Not going to read that now?

THE COURT: I certainly don't feel, it's not in evidence. The transcript of Sergeant Allen, that was, that was a choice made to have him live, which was fine. To the extent that there was something relevant, it was brought out on cross examination.

MR. KURLAND: I said if you were going to read, not suggesting.

THE COURT: That's fine. I just want to make sure that everybody understands.

MR. KURLAND: I just think it lacks, it just lacks the [231] probable cause that Sergeant Lewis wants you to believe that he had.

Last time, Judge. There was no way that Ronald Seldon was leaving that scene. And what did we have? You had a compartment in a car and the guy that was speeding. What else did you have other than the self, the self-offered statements? Judge, I mean, Judge if I took money out of my pocket, and I don't have a whole lot.

THE COURT: Look, I know courts, judges, you know, the rules - the law does not have to be divorced from common sense. Here was a man who he knew had secret compartments in his car. He at least suspected. And even if he shouldn't have known that, he had every reason to suspect that. Air

freshener all over the c[illegible] He opens it up. The guy is a suspect in narcotics investigat[illegible] He knows that. That's only to say, this is not just some kind of random thing. He sees him with a wad of money. And then he says he's nervous. Now, if he had said he was cool, he also would have said, he wasn't nervous. And I give some scant to that.

But I hate to say it, but even on that other stuff, this is close. I admit that it's close. But I'm getting tired of courts having to let people, common sense tells you that something's going on there. Is it probable cause? That is a fair argument. But people don't go driving around with wads of money. Innocent people, this is not a routine thing. This [232] isn't reasonable doubt. You don't do it, I don't do it, the marshals don't do it. People don't go driving around with air fresheners which blows you away when you open it up, and that's undisputed. You don't drive around with secret compartments and you don't drive around with wads of money in your pocket.

MR. KURLAND: Judge, at the very worse, this would be, at the very worse, if you agree with the government, it would be a Terry stop. It would only be a Terry stop. It wouldn't be sufficient, Your Honor, to establish probable cause.

THE COURT: I hear you. I hear you. That is a tough, I think it's a tough judgment here. Ms. Manuelian.

MR. KURLAND: Then again, what else elevates it to the probable cause, Judge? That's the point.

THE COURT: I didn't say that it wasn't. I said it was a close call. I find that it is probable cause.

MR. KURLAND: Thank you, Your Honor.

THE COURT: And I find that, in fact, he was nervous. And in fact, very nervous, he was scared to death because, contemporaneously, that's what the officer said. I didn't see anything on the tape to dissuade me from that view.

MS. MANUELIAN: Your Honor, I don't really have anything to add. I think the Court, we agree with the Court's rulings.

THE COURT: So that's my ruling. I'm going to deny the motion to suppress.

[233] What should we do? Have a scheduling conference? Now, new stage of the case, which is unfortunate. Have to get new counsel. Where do we go? We never got a trial date.

MS. WHITE: Yes. March.

THE COURT: Okay. Co-counsel, you're in touch with them, everything. They still around?

MS. WHITE: At this point they are, Your Honor.

MR. KURLAND: Two out of three.

THE COURT: Thanks a lot. Should we have a scheduling conference at some point between now and then to know where things stand?

MR. SEMEL: Yes, Your Honor. I would suggest we do that.

MS. WHITE: Perhaps sometime in mid-January, Your Honor.

MR. SEMEL: There are further issues in light of your ruling.

THE COURT: Yeah. 8:30 one morning mid January? THE CLERK: Wednesday the 7th?

THE COURT: January 7th, 8:30?

MR. SEMEL: Not good for me, Judge.

(Off-record discussion on scheduling.)

THE COURT: December 18th, 8:30.

Thank you all very much for you excellent presentations. Very interesting case.

MS. WHITE: Thank you, Your Honor.

MR. KURLAND: Thank you, Your Honor.

(Conclusion of Proceedings.)

APPENDIX E

IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY, MARYLAND

Criminal No. K-00-1402

STATE OF MARYLAND,

v.

RONALD SELDON,

Defendant.

Annapolis, Maryland
January 30, 2002

MOTIONS HEARING

WHEREUPON, proceedings in the above-entitled matter commenced.

BEFORE: THE HONORABLE MICHAEL E. LONEY, *Judge*

APPEARANCES

FOR THE STATE:

EILEEN REILLY, Esquire
7 Church Circle, Suite 200
Annapolis, Maryland 21401

FOR THE DEFENDANT:

RONALD I. KURLAND, Esquire
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* * * *

[204] from the Pohanka dealership. And I will turn it over to Ms. Bledsoe.

MS. BLEDSOE: And I will call Bruce Willey to the stand, please. Mr. Willey, please come up, right there in the little compartment.

Whereupon,

BRUCE DWAYNE WILLEY

was called as a witness by the Defendant, having been first duly sworn was examined and testified as follows:

THE CLERK: Please state your name and occupation, and spell your name for the record.

THE WITNESS: Bruce Dwayne Willey, W-i-l-l-e-y. Auto technician, Pohanka Mazda.

THE COURT: All right. Let's begin, please.

MS. BLEDSOE: Sorry, Your Honor.

DIRECT EXAMINATION

BY MS. BLEDSOE:

Q Mr. Willey, how long have you worked at Pohanka car dealership?

A Ten years.

Q And what is your job there?

A Auto technician.

Q And how long have you been an auto technician?

A Total, about 20 years.

Q Can you describe, please, the car dealership in [205] terms of whether it has fencing around it?

A There's a three- to four-foot high fence all the way around the front with a gate at each driveway.

Q Are the gates able to be locked?

A They are not locked at night, but there's a guard, usually, that runs back and forth between all the gates.

Q Does it also have service bays on the property?

A Yes.

Q How many?

A Ten service bays in our building.

Q And are they all in one big garage building?

A Yes, two separate halves, but yes, all one building.

Q And is that building able to lock—is it a locked facility?

A Yes.

Q And do people leave their cars there overnight?

A Yes.

Q And then the facility is locked, I guess.

A Correct.

Q Okay. Let me direct your attention to October 29, 1999. Do you recall that date?

A Yes.

Q Do you remember it was Mr. Seldon's car that you were working on?

[206] A Right.

Q And do you recall what the problem was with the car?

A I was given the job to replace a fuel pump.

Q And during your inspection of the car -were you the only mechanic that worked on the car?

A The fuel pump was ordered by another technician before.

Q But were you the only mechanic that worked on the car?

A Yes.

Q And when you were inspecting the car, was there something unusual you found?

A Yes.

Q And as a result of that, what did you do?

A I notified the service adviser that I had found something usual, and stopped.

Q And as a result of what your service manager told you, what did you do?

A We went ahead and replaced the fuel pump, and finished the job up as normal, parked the vehicle.

Q When you replaced the fuel pump, did you have to take the front seat off?

A I took the two front bolts out of the front seat, yes.

[207] Q When you repaired the car, did you put everything in the car back together again the way a car would look?

A Yes.

Q When you parked it in the parking lot, how would you describe the inside of the car?

A The same way, the same condition that it came in. Everything should have been back together.

Q And during that day, did Sgt. Lewis arrive at Pohanka car dealership?

A Yes.

Q Do you recall what time?

A Five o'clock.

Q Did you meet him?

A I was leaving to go home. When I went outside to get in my vehicle, I seen Sgt. Lewis standing there, yes.

Q And as a result of what Sgt. Lewis said, what did you do?

A He asked me to pulled the vehicle back in.

Q Into –

A A service bay.

Q And did you do that?

A Yes.

Q After the car was pulled into the service bay, what did you do?

A I talked to Sgt. Lewis for a few minutes, kind of [208] explained what I had seen, and that was basically it?

Q Did you get out of the vehicle?

A Oh, yes.

Q And who inspected the vehicle?

A Sgt. Lewis and Detective Wendelet.

Q Was there any other Pohanka employee there directing Sgt. Lewis through the inspection?

A No.

Q Were you there during the whole time of the inspection?

A Off and on. I was in the shop at the whole time, but I didn't stand there and watch him do it the whole time, no.

Q When you pulled the car into the garage upon Sgt. Lewis's request, can you describe the condition of the car, the inside of the car?

A It was all put back together.

Q Who pushed the seat back then, when the car was back in the garage?

A Sgt. Lewis.

Q And who pulled the carpet up?

A Sgt. Lewis.

Q And what else did Sgt Lewis do to the car?

A I seen him, you know, looking around, but like I say, I didn't stay there the whole time and look over his [209] shoulder, so I'm not real sure.

Q Did he do anything with the wires, do you recall?

A Not that I recall, no

Q To your recollection, did anybody direct Sgt. Lewis, anybody from Pohanka dealership direct Sgt. Lewis while they were inside the car?

A No.

Q Do you know Sgt. Lewis?

A I went to high school with him.

Q And do you know Mr. Seldon?

A No.

Q Have you ever seen Mr. Seldon before?

A Not that I know of.

Q Okay. Was there any reason that you would come in here and lie for Mr. Seldon?

A No.

Q In fact, you were somewhat no, strike that. Thank you, very much.

THE COURT: Any cross-examination?

MS. REILLY: Yes, thank you.

CROSS-EXAMINATION

BY MS. REILLY:

Q Mr. Willey, do you remember what the complaint was in reference to the van when it was brought in for servicing?
[210] A No, because I did not diagnose it. The gentlemen who diagnosed it went out with a heart attack, so I was given the job.

Q Okay. And at that point, Mr. Seldon had already dropped it off when you came in contact with the van, right?

A Correct.

Q And what caused you to go work on the fuel line?

A The other technician had ordered a fuel pump for the vehicle.

Q And the person who had diagnosed the problem, was that done the same day that you worked on it?

A I do not know for sure, no.

Q And after you talked to your service manager, do you know how Sgt. Lewis and Deputy Wendelen had occasion to come to the dealership?

A No.

Q Now, when you said that you had driven the vehicle out of the bay—

A Correct.

Q —when Sgt. Lewis was there, where did you park the car?

A We had a customer done parking facility where, you know, just all the cars that are done are parked in a line.

Q Okay. And is that in a fenced in area?

A It's part of the lot itself.

[211] Q But it is the property of your dealership?

A Correct.

Q And that car, even though the work had been completed, was still in the custody of Pohanka, correct?

A Correct.

Q In fact, it would still be in the custody of Pohanka up until the bill was paid, correct?

A Correct.

Q And don't pay for car repairs until the work is done, correct?

A Correct.

Q And in this case, that bill had not been paid, correct?

A I believe it was warranty.

Q Now, when Sgt. Lewis asked you to move the vehicle in, you did that.

A Correct.

Q He just said

A He asked me to get the keys to it and pull it back in.

Q Okay. And you had no problem doing that.

A No.

Q You didn't question him why?

A No.

Q You didn't question him as to who told him that it [212] was all right to move the vehicle in?

A No.

Q Had Sgt. Lewis ever come to your dealership before this date to inspect a vehicle that had a hidden compartment?

MR. KURLAND: Objection. Relevancy, Your Honor.

THE COURT: Sustained.

BY MS. REILLY:

Q Sir, you don't know what your service manager told Sgt. Lewis he could or could not do in reference to the vehicle, do you?

A No.

Q So it is fair to say, sir, that your service manager could have told Sgt. Lewis--

MR. KURLAND: Objection, Your Honor.

THE COURT: All right. Sustained.

BY MS. REILLY:

Q And you weren't there the entire time the vehicle was being inspected?

A I was in the shop the whole time, but I did not stand there and watch him the whole time, no.

Q And do you recall who was there besides the sergeant and a deputy?

A Nobody that, you know, stayed right there, you know, there was people walking through the shop at the time, [213] but nobody stood there and watched the whole time.

Q Now, this event occurred on what day?

A October 26, '99?

Q Of what year?

A Ninety-nine.

Q And you remember that date because—

A I remember parts of it, because it was a very unusual day.

Q But as to the date, itself, October- what did you say—26th?

A I was thinking 26th.

Q Okay. Do you remember that date, or did someone remind you that that was the date?

A Actually somebody reminded me.

Q And somebody reminded you of the date; did they also remind you of what happened that day?

A I was given a copy, I did my affidavit that I give, but that's the only thing.

Q An affidavit?

A Well, there was—I guess when I talked to the private detective when he came down to subpoena me?

Q And you gave a written statement and signed it?

A No, I just basically talked to him, and I didn't sign anything.

Q And do you recall what the private detective told [214] you about that date?

A He just—

MS. BLEDSOE: Objection.

THE COURT: Overruled, and you may answer yes or no. Do you recall or don't you? Yes or no.

THE WITNESS: What was the question, again?

THE COURT: Do you recall what the private detective told you about it?

BY MS. REILLY:

Q About this incident.

A He didn't actually tell me anything. He just asked me what I had—

THE COURT: The answer, then, is yes or no? You remember or you don't remember?

THE WITNESS: No.

THE COURT: Okay.

BY MS. REILLY:

Q Okay. And when did you speak with this private investigator, sir?

A It was when we were subpoenaed the first time. He served me a subpoena at the same time.

Q Okay. That was in 2001, correct?

A I can't honestly say; I don't know.

Q It wasn't shortly after this event occurred, though, right?

[215] A No, it was white awhile.

Q Okay. And fair to say that your—you didn't take any notes or anything at the time, did you?

A No.

Q Is it fair to say that your recollection now is not complete as to every single detail?

A Yes.

Q Okay. And you don't remember if your service manager was there at the time Sgt. Lewis was inspecting the vehicle or not?

A No, I don't.

MS. REILLY: That is all I have, thank you.

THE COURT: Any follow-up questions?

MS. BLEDSOE: Yes, Your Honor, just one.

THE COURT: Sure.

REDIRECT EXAMINATION

BY MS. BLEDSOE:

Q You do recall whether or not Sgt. Lewis was inspecting the vehicle inside the service bay?

A Yes, he was.

Q And the vehicle wasn't – he was the one that inspected the vehicle.

A Correct.

MS. BLEDSOE: I have nothing further.

BY MS. BLEDSOE:

[216] Q Thank you, very much, Mr. Willey.

THE COURT: Just a moment, sir. Any redirect questions?

MS. REILLY: No, Your Honor.

THE COURT: Recross—no.

Mr. Willey, I want to make sure I understand something.

THE WITNESS: Okay.

THE COURT: This incident that took place back in October of 1999, whatever the date was --

THE WITNESS: Correct.

THE COURT:—if I understand—I want to make sure I understand your testimony. Is it true that you notified your service manager of something about this vehicle?

THE WITNESS: My service adviser, actually, yes.

THE COURT: Service adviser, okay. What did you advise the service adviser?

THE WITNESS: I advised him that there was something unusual, that when I flipped the seat up there was like a well there that, you know, shouldn't have been there. And I stopped at that point and notified him.

THE COURT: What seat, sir?

THE WITNESS: The right front seat.

THE COURT: All right. Did you advise the service

* * * *

APPENDIX F

COURT OF SPECIAL APPEALS OF MARYLAND

No. 597
Sept. Term, 2002

RONALD L. SELDON

v.

STATE OF MARYLAND

May 29, 2003

Argued before MURPHY, C.J., GREENE, BISHOP and JOHN J., JR., (Ret'd, specially assigned), JJ. MURPHY, *Chief Judge*:

In the Circuit Court for Anne Arundel County, Ronald L. Seldon, appellant, was convicted of possession with the intent to distribute more than 448 grams of cocaine and related violations of the Maryland Controlled Dangerous Substances Act.[1] Appellant concedes that the evidence was sufficient to establish that he committed those offenses on July 13, 2000, but argues that the circuit court erred in denying his Motion to Suppress that evidence. Appellant now presents two questions for our review:

I. Did The Lower Court Err When It Denied Appellant's Motion To Suppress The Search Of His Vehicle That Occurred On October 29, 1999?

II. Did The Lower Court Err When It Denied Appellant's Motion To Suppress The Search Of His Vehicle That Occurred On July 13, 2000?

For the reasons that follow, we shall answer "yes" to each question, and we shall therefore reverse the judgments of the circuit court.

Factual Background

I. The October 29, 1999 Search

On October 26, 1999, appellant drove his vehicle to Pohanka Mazda, an automobile dealership in Salisbury, Maryland.[1] On October 29, 1999, an employee of the dealership contacted the Wicomico County Police Department to report that something "suspicious" had been discovered in a vehicle that had been brought in for service. Detective Carson Wentland of the Wicomico County Police Department received the call. Before proceeding to the dealership, he contacted the Maryland State Police and requested assistance. Maryland State Police Sergeant Michael Lewis was dispatched to the dealership. When Sergeant Lewis and Detective Wentland arrived, they were directed to appellant's vehicle by Bruce Willey, the mechanic who had made the repairs, and John Fiscus, a supervisor. At the time the officers arrived, appellant's vehicle had been repaired and was ready to be picked up.

Sergeant Lewis directed Mr. Willey to drive the vehicle into the service bay area. Once the vehicle was in the service bay, Mr. Willey pointed to the section of the vehicle where he had discovered the suspicious item. Sergeant Lewis then entered the vehicle, pushed back the front seat, lifted the carpet, and observed a secret compartment.[2] He lifted the lid of the compartment and looked inside, but found nothing.

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[1] On October 26, 1999, appellant dropped off his vehicle because it was "stalling out." Although the specific problem was not diagnosed immediately, it was ultimately determined that the fuel pump had to be replaced.

[2] The compartment had a hinged metal door, which could be opened only after two metal bolts were unfastened.

Upon further examination of the vehicle, Sergeant Lewis discovered a second secret compartment which was located in the gas tank. This compartment, which was electrically and hydraulically powered, could not be opened by hand. Sergeant Lewis attempted to open the compartment by using his "alligator grips," but his attempt was unsuccessful. He then used a screwdriver to pry open the compartment "slightly," and was able to determine that there was no contraband in the compartment. Sergeant Lewis reported his findings to the Wicomico County Narcotics Task Force, and was told by a member of that organization that appellant was a suspected drug dealer in the area. Because no contraband was found in appellant's vehicle, the officers took no further action on this occasion.

II. The July 13, 2000 Search

On July 13, 2000, Sergeant Lewis spotted appellant's vehicle traveling eastbound on Route 50 near Annapolis, Maryland, and stopped the vehicle because it was traveling at the speed of 71 m.p.h. in a posted 55 m.p.h. zone. Appellant was the sole occupant of the vehicle. Sergeant Lewis approached the passenger side of the vehicle and, through an open window, asked for appellant's license and registration. According to his suppression hearing testimony, at this point Sergeant Lewis noticed: (1) a strong odor of air freshener coming from the interior of the vehicle; (2) law enforcement decals affixed on the vehicle's windshield; (3) the "definitive odor of cocaine;" and (4) a large "wad" of money that came protruding out of appellant's pocket as appellant reached for his driver's license.[1] Sergeant Lewis also testified that appellant seemed to be "extremely nervous," that appellant's "carotid pulse was pounding," and that all of these observations were consistent with illegal drug activity.

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[1] It was later determined that appellant had $3,000.00 on his person.

When Sergeant Lewis examined appellant's license and registration, he realized that appellant was under investigation by the Wicomico County Narcotics Task Force, and recognized appellant's vehicle as the vehicle searched nine months before at Pohanka Mazda. Sergeant Lewis returned to his vehicle and placed a call to determine the status of appellant's license. After being informed that the license was valid, Sergeant Lewis called Sergeant Michael Kenhart of the Wicomico County Narcotics Task Force. During this conversation, Sergeant Lewis stated that he had stopped appellant for a traffic violation and that he "had enough to do him," but wanted to know whether the arrest of appellant might adversely affect any Task Force investigation. Sergeant Kenhart responded that appellant was still under investigation, and he would call back with an answer. A few minutes later, Sergeant Kenhart called back, and told Sergeant Lewis that the Task Force had no objection to appellant's arrest. At this point, Sergeant Lewis called for backup and requested a canine unit,[4] and activated a video and audio recording system that provided the suppression hearing court with the ability to review the stop from that point forward.

Sergeant Lewis again approached appellant's vehicle, and asked appellant to step out. Sergeant Lewis then asked appellant for permission to search the vehicle. Appellant refused that request. Sergeant Lewis continued to converse with and question appellant until the backup unit arrived. Once the backup unit arrived, Sergeant Lewis patted down appellant to search for any weapons.[5] Sergeant Lewis then proceeded to search the vehicle. Almost immediately, he located the two steel compartments that he had previously searched at the dealership.[6] The compartment located underneath the front

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[4] A canine unit was not available to respond to the scene.

[5] No weapons or drugs were found on appellant's person.

[6] Another officer who was on the scene was amazed at how fast Sergeant Lewis located the compartments.

passenger seat was empty. A search of the second compartment turned up what appeared to be one package of cocaine and two packages of marijuana, each of which was covered by a fabric softener secured by saran wrap and clear packaging tape.[*] Appellant was arrested and charged accordingly.

III. The Circuit Court's Ruling

After a hearing on appellant's Motion to Suppress, the circuit court filed a Memorandum and Order that included the following findings of fact and conclusions of law:

> Two separate searches occurred as previously outlined. The Court will therefore separately examine the constitutionality of each search.

July 13, 2000

In assessing the constitutionality of the search of Defendant's vehicle, the Court must first determine whether Sergeant Lewis' stop of the vehicle was reasonable. The Maryland Court of Special Appeals reiterated the Supreme Court guidelines that

> "the level of suspicion required for a stop is considerably less than the proof needed for probable cause." *Lawson v. State*, 120 Md.App. 610, 618, 707 A.2d 947 (1998) (citing *Quince v. State*, 319 Md. 430, 433, 572 A.2d 1086 (1990)); *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).

The initial stop of Defendant's vehicle for speeding was legitimate and reasonable. Sergeant Lewis testified that while traveling behind Defendant's vehicle, he paced Defendant speeding at approximately 71 m.p.h. in a 55 m.p.h. zone.

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[*] Field tests were concluded on the cocaine and marijuana. The tests were positive. The total weight of the cocaine was 497 grams, with 125 grams of packaging. The total weight of the marijuana was 854 grams, with 122 grams of packaging.

Consequently, Sergeant Lewis was justified in stopping Defendant for a traffic infraction, which has been acknowledged by Defendant.

The Fourth Amendment protects against unlawful searches and seizures including seizures that involve only a brief detention. *United States v. Mendenhall*, 446 U.S. 544, 551, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). A traffic stop is a detention that implicates the Fourth Amendment. *United States v. Sharpe*, 470 U.S. 675, 682, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). The Supreme Court has made it clear that a detention should only last as long as it [sic] necessary to effectuate the purpose of the stop. *Ferris v. State of Maryland*, 355 Md. 356, 369, 735 A.2d 491 (1999) (quoting *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)). As previously discussed, the stop, of Defendant implemented the Fourth Amendment but was a valid seizure based on probable cause – the Defendant was speeding. There are numerous cases that discuss when it is appropriate for an officer to detain a driver for further investigation, once the purpose of the traffic stop has been fulfilled. In two instances the detainment is constitutionally permissible under the Fourth Amendment: (1) the driver consents to the continuing intrusion; (2) the officer has a reasonable, articulable suspicion that a crime is being or is about to be committed. *Ferris*, 355 Md. at 372, 735 A.2d 491 (citing *United States v. Sandoval*, 29 F.3d 537, 540 (10th Cir.1994)).

To determine whether a seizure has occurred under the Fourth Amendment, the test is whether in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Ferris*, 355 Md. at 376, 735 A.2d 491.

Before addressing the issue of consent and reasonable suspicion, the Court must determine whether the stop of Defendant constituted one or two stops. The Court is assisted by the video tape which provides a minute by minute recorda-

tion of the stop. Sergeant Lewis stopped Defendant at approximately 1:50 p.m. and activated the recording system immediately thereafter. At 1:53 p.m. Sergeant Lewis received confirmation that Defendant's license was valid. At 2:00 p.m. Sergeant Lewis received information regarding the registration of the vehicle. Sergeant Lewis testified that in this time period he began to prepare a warning citation for the speeding offense. Sergeant Lewis returned to Defendant's vehicle at 2:03 p.m. It is inferred that if this had been a routine traffic stop without incident, Sergeant Lewis would have returned Defendant's driver's license and vehicle registration, issued the warning and Defendant would have been on his way. The stream of events did not occur. Defendant was not given his license, registration or a citation. Sergeant Lewis had already determined before he approached Defendant's vehicle for the second time that he was going to search the vehicle. It is evident that Sergeant Lewis removing Defendant from his vehicle was not justified by the first stop for speeding. The Sergeant's initial purpose in stopping Defendant was to enforce the laws of the roadway and to investigate the manner of driving with the intent to issue a citation or warning. Once the purpose of the stop was fulfilled, the continued detention of the car and occupant amounted to a second detention. *Id.* at 372, 735 A.2d 491; *See Rover*, 460 U.S. at 500, 103 S.Ct. 1319. Consequently, at 2:03 p.m. the initial stop concluded and a second and separate stop began.

The Court must, therefore, determine whether Defendant consented to the questioning outside the vehicle or if Sergeant Lewis had a reasonable and articulable suspicion to support the second detainment of Defendant. A consensual encounter is defined as the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement official. *Ferris*, 355 Md. at 373, 735 A.2d 491 (citing *United States v. Werking*, 915 F.2d 1404, 1408 (10th Cir.1990)). In this type of encounter, a private citizen is not seized under the meaning of the Fourth Amendment, because he is free to

leave at any time. *Id.* Questioning an individual is allowed as long as the officer does not convey a message that compliance with the request is required. *Ferris*, 355 Md. at 375, 735 A.2d 491 (quoting *Florida v. Bostick*, 501 U.S. 429, 434-35, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991)). The test is objective, not subjective, therefore the Court must decide whether a reasonable person would have believed that he was free to end the conversation or encounter. *Ferris*, 355 Md. at 375, 735 A.2d 491. The Court looks at a variety of factors including:

> the time and place of the encounter, the number of officers present and whether they were uniformed, whether the police removed the person to a different location or isolated him or her from others, whether the person was suspected of a crime, whether the police retained the person's documents, and whether the police exhibited threatening behavior or physical contact that would suggest to a reasonable person that he or she was not free to leave.

Id. at 377, 735 A.2d 491. Sergeant Lewis walked to the driver's side of Defendant's vehicle and stated to Defendant, "Come on back here. I wanna talk to you for a minute - come back here." The parties proceeded to a location away from the side of the road and between the two vehicles. As evidenced by the video tape, Sergeant Lewis stood two to three feet from Defendant. At that time, Sergeant Lewis was still in the possession of Defendant's driver's license and registration, had not yet issued any type of citation, and suspected Defendant of committing a crime-possession of CDS. Defendant did not voluntarily exit the car, did not consent to the questioning and he was not free to leave at any time. A reasonable person in the position of Defendant would not have felt free to leave, consequently a seizure occurred.

The Court, therefore, must determine whether the detainment of Defendant was based on reasonable and articulable

suspicion of criminal conduct to determine whether it was a constitutional seizure. The United States Constitution requires that "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 384, 735 A.2d 491 (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). The standard is objective as to whether a reasonably prudent person in the officer's position would have been warranted in believing that Defendant was involved in criminal activity that was afoot. *Ferris*, 355 Md. at 384, 735 A.2d 491 (citing *Derricott v. State*, 327 Md. 582, 588, 611 A.2d 592 (1992)). Any determination of reasonable suspicion must be based on the totality of the circumstances-the whole picture. *Ferris*, 355 Md. at 385, 735 A.2d 491 (citing *Sokolow*, 490 U.S. at 8, 109 S.Ct. 1581, quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)). The suspicion is less that the level of probable cause. *Ferris*, 355 Md. at 385, 735 A.2d 491 (citing *Graham v. State*, 325 Md. 398, 408, 601 A.2d 131 (1992)). "[I]t is not enough that law enforcement official can articulate reasons why they stopped someone if those reasons are not probative of behavior in which few innocent people would engage-the factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied." *Karnes v. Skrutski*, 62 F.3d 485, 493 (3rd Cir.1995).

When Sergeant Lewis approached Defendant's vehicle and asked for his license and registration, he made numerous observations. He observed a strong odor of air fresheners emitting from the vehicle; Defendant was extremely nervous in that his carotid pulse was pounding and he did not make eye contact; Defendant produced a large 'wad' of cash from his pocket as he retrieved his license and registration; the car was very clean; the windshield was affixed with stickers indicating support for the police. All of these observations caused Sergeant Lewis to be suspicious that Defendant might

be in the possession of CDS. He also believed that he smelled the "definitive odor of cocaine." In addition, he recalled Defendant's name as a suspected drug dealer and remembered the observations he made in October 1999 of the concealed compartments in the vehicle. Considering Sergeant Lewis' observations in the aggregate, the Court finds that he had reasonable, articulable suspicion to continue to detain Defendant for further investigation. Consequently, the Court finds that the second detainment was not an unconstitutional seizure.

The final issue for the Court to decide is if the search of Defendant's vehicle was based upon probable cause. Maryland Code, Article 27, § 594B(c) provides:

> A police officer may arrest a person without a warrant if the officer has probable cause to believe that a felony has been committed or attempted and that such person has committed or attempted to commit a felony whether or not in the officer's presence or view.

Probable cause requires less evidence "than would justify conviction but more evidence than that which arouse a mere suspicion." *Wilkes v. State*, 364 Md. 554, 584, 774 A.2d 420 (2001). "Because many situations which confront officers in the course executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusion of probability." *Id.* at 585, 774 A.2d 420. Sergeant Lewis questioned Defendant outside the vehicle. Defendant did not consent to the search. Defendant denied that he was transporting any illegal substance including cocaine. Sergeant Lewis patted down Defendant to check for weapons; no weapons or other contraband were found. Among his observations, Sergeant Lewis believed that he smelled the "definitive odor of cocaine."

Odors gained from the unaided human senses may furnish evidence of probable cause. *Ford v. State of Maryland*, 37

Md.App. 373, 378, 377 A.2d 577 (1977)(citing *Johnson v. United States*, 333 U.S. 10, 13, 68 S.Ct. 367, 92 L.Ed. 436 (1948)).

Knowledge gained from the sense of smell alone may be of such character as to give rise to probable cause for a belief that a crime is being committed in the presence of an officer. *Ford*, 37 Md.App. at 379, 377 A.2d 577.

In *Ford*, the officer testified that he smelled an odor of marijuana emanating from within the vehicle. *Id.* Consequently the Court found that the officer had probable cause to believe that the vehicle contained marijuana and probable cause for the Defendant's arrest existed. *Id.* at 380, 377 A.2d 577. Therefore, the search of the vehicle was valid as a search incident to an arrest. *Ford*, 37 Md.App. at 380, 377 A.2d 577 (citing *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)), or under the automobile exception to the Fourth Amendment. *Ford*, 37 Md.App. at 380, 377 A.2d 577; *See Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

The facts before this Court also contemplate the same principle-whether smell plus the aggravating factors constituted probable cause. Sergeant Lewis did not observe any illegal substance in plain view in the vehicle or on the body of Defendant pursuant to the frisk. The basis of his articulable suspicion was comprised of his observations including what he perceived to be the "definitive odor of cocaine."

The cocaine confiscated from Defendant's vehicle weighed 497 grams without the packaging and was cut with caffeine. It was wrapped with fabric softeners, saran wrap and clear packaging tape. It was concealed in an electronically and hydraulically controlled steel compartment below the floorboards of the vehicle, which also contained 854 grams of marijuana similarly packaged. Sergeant Lewis testified that he smelled air fresheners mixed with the "definitive odor of

cocaine." When asked to describe what cocaine smells like he responded, "cocaine smells like cocaine."

* * *

Based on the testimony, it is apparent that some of the witnesses associate a particular smell with the odor of cocaine – "cocaine smells like cocaine". It is, however, scientifically impossible that the confiscated drug could be detected because the cocaine seized and the caffeine with which it was cut had no detectible odor. Although Sergeant Lewis stated that he smelled the definitive odor of cocaine, the Court finds that it was impossible for him to have done so. The Court, however, finds that Sergeant Lewis believed that he smelled cocaine from the odors with which he associated it. The cocaine was wrapped in layers of masking agents. Notwithstanding Sergeant Lewis' belief that he smelled cocaine, based on the totality of the circumstances, the Court finds that all of the observations and prior knowledge of the police officer of Defendant and the vehicle created a reasonable and articulable suspicion to investigate further, and amounted to probable cause to search the vehicle. Defendant's constitutional right to be protected from illegal searches and seizures was not violated. The Court finds that the search of the vehicle and the seizure of the cocaine and marijuana was lawful.

October 26, 1999

. . . . The question becomes whether the bailee, the dealership could consent to a search by Sergeant Lewis and Detective Wentland.

* * *

Once Defendant delivered the vehicle to the dealership for service, the vehicle was in the control and possession of the dealership. Mr. Willey testified that he worked on the vehicle and noticed a suspicious item that was not considered a

feature of the Mazda MPV or any Mazda vehicle. Mr. Willey reported the suspicious item to his supervisor who reported the finding to the authorities.

Sergeant Lewis and Detective Wentland arrived at the dealership and Mr. Willey described to them what he had observed. The vehicle was driven to the service bay by Mr. Willey and the officers were directed to the area of the vehicle where the suspicious item had been located. Thus the bailee, the dealership, consented to the search. Sergeant Lewis and Detective Wentland moved the seat and lifted the carpeting to view what was ultimately determined to be the concealed compartments. The first compartment was opened and nothing was found. The second compartment could not be opened because it was hydraulically and electronically controlled. Sergeant Lewis attempted to open the compartment using wires but was unsuccessful; he peeked in the compartment using a screwdriver. . . . The actions by Sergeant Lewis and Detective Wentland did not exceed the scope of the search. The suspicious item identified by the dealership was located beneath the floorboards near the gas tank. The officers did not search any other area of the vehicle—i.e. the trunk or glove box-except where they were directed to search by the dealership employees. The Court finds that the search of Defendant's vehicle at the dealership was not an illegal search under the Fourth Amendment. The bailee's consent made it a reasonable search.

For these reasons, the Court will deny the Motion to Suppress relating to the incident that occurred on July 13, 2000, and deny the Supplemental Motion to Suppress relating to the incident that occurred on October 26, 1999.

Appellant was thereafter convicted and this appeal followed.

Discussion

While we are persuaded that the circuit court did not make any clearly erroneous finding of fact, we are also persuaded

that the circuit court erred in denying appellant's motion for suppression.[8] The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. It is well settled that, under the Fourth Amendment,[9] a search conducted without a warrant issued upon probable cause is "per se unreasonable . . . subject only to a few specifically established and well-delineated excep-

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[8] In reviewing the denial of a motion to suppress, we look only to the record of the suppression hearing and do not consider the record of the trial. *Trusty v. State*, 308 Md. 658, 670-71, 521 A.2d 749 (1987) (quoting *Jackson v. State*, 52 Md.App. 327, 332 n. 5, 449 A.2d 438, *cert. denied*, 294 Md. 652 (1982)); *see also Carter v. State*, 367 Md. 447, 457, 788 A.2d 646 (2002); *Watkins v. State*, 90 Md.App. 437, 439, 601 A.2d 1115, *cert. denied*, 327 Md. 80, 607 A.2d 921 (1992). We are further limited to considering only those facts that are most favorable to the State as the prevailing party on the motion. *Riddick v. State*, 319 Md. 180, 183, 571 A.2d 1239 (1990); *see also Simpler v. State*, 318 Md. 311, 312, 568 A.2d 22 (1990). In considering the evidence presented at the suppression hearing, we extend great deference to the fact finding of the suppression hearing judge with respect to the weighing and determining first-level facts. *Perkins v. State*, 83 Md.App. 341, 346, 574 A.2d 356 (1990). When conflicting evidence is presented, we accept the facts as found by the hearing judge unless it is shown that his findings are clearly erroneous. *Ferris v. State*, 355 Md. 356, 368, 735 A.2d 491 (1999); *Riddick*, 319 Md. at 183, 571 A.2d 1239. Even so, as to the ultimate conclusionary fact of whether an action taken was proper, we must make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case. *Id.*; *Perkins*, 83 Md.App. at 346, 574 A.2d 356.

[9] Appellant's Motion to Suppress was founded on the Fourth Amendment to the Constitution of the United States, which through the Fourteenth Amendment-is applicable to state prosecutions. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961). The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

tions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). It is also well settled that if data set forth as a basis for the existence of probable cause . . . was come upon or derived as a result of an illegal search and seizure [that the party moving for suppression of evidence has "standing" to seek that relief], such primary illegality-in the absence of evidence of attenuation or a source independent of such "taint-precludes the use of such derivative evidence from being a valid basis for establishing the existence of probable cause, under the doctrine of the "fruit of the poisonous tree." *Everhart v. State*, 274 Md. 459, 480, 337 A.2d 100 (1975). The "fruit of the poisonous tree" doctrine is applicable to the judgments of conviction at issue in the case at bar.

I.

One of the specifically established exceptions to the warrant requirement is a search that is conducted pursuant to a valid consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). A less common variation of the standard consent case is that of third-party consent. In *United States v. Matlock* 415 U.S. 164 171 94 S.Ct. 2041, 39 L.Ed.2d 242 (1973), the United States Supreme Court held that a third party who "possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected" may validly consent to a search of the premises or those effects. *Id.* at 171, 94 S.Ct. 988. The Matlock Court noted:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent . . . rests on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk

> that one of their number might permit the common area to be searched.

Id.

"The resolution of the issue of consent always turns on the facts of each case." *State v. Miller*, 144 Md.App. 643, 651, 799 A.2d 462 (2002). Professor LaFave's treatise on the Fourth Amendment explains that "of obvious importance" in determining whether a bailor assumes the risk that a bailee would consent to a search is "the extent to which the bailor made efforts to secure, even as against the bailee, the privacy of his effects." 3 W. LAFAVE, SEARCH AND SEIZURE §§ 8.6(a)(3d ed.1996). LaFave went on to state:

> Where possession of the car was given on the understanding that the bailee would subject it to general use, driving it about for his own purposes, then the bailee may give effective consent to a search of those portions of the car which he could be expected to make use of. If, for example, the owner hands over both the ignition key and trunk key, then the bailee may consent to a search of the trunk, for, as noted in *United States v. Eldridge*, "access to the trunk is a normal incident to the use of an automobile." But if the bailment of the car is for a special and limited purpose, then that purpose must be taken into account in assessing the extent of risk assumed by the bailor.

Id. (Emphasis added)(footnotes omitted).

Neither the Court of Appeals nor this Court has addressed the issue of whether a mechanic has the authority to consent to a search of a vehicle that the mechanic has been authorized to repair.[10] This issue, however, has been addressed by other

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[10] "The waiver of Fourth Amendment rights by a third party most often involves a spouse, cotenant or co-owner, or a parent or guardian." *In Re Tariq A-R-Y*, 347 Md. 484, 493, 701 A.2d 691 (1997).

appellate courts, including the United States Court of Appeals for the Fourth Circuit. In *United States v. Eldridge*, 302 F.2d 463 (4th Cir.1962), the defendant loaned his automobile to a friend, who was driving the automobile when it was stopped because the police had been notified by a caller that there might be stolen guns in the automobile. The police asked if they could search the vehicle, and the friend gave them permission to do so, and voluntarily opened the trunk which revealed the presence of two stolen Coast Guard radios.[11] Prior to trial, the defendant unsuccessfully argued that the evidence should be suppressed because "the protection of the Fourth Amendment was a personal right that could not be waived for him by . . . a gratuitous bailee of the car." His motion was denied. The appellate court affirmed, explaining:

On the merits of the constitutional issue we agree with the result reached by the District Court. Not every search made without a warrant is illegal. The Fourth Amendment prohibits only 'unreasonable' searches and seizures. Such decision as have been cited to us or discovered by research have only a peripheral bearing on the question to be decided in this case. Lower federal courts have deemed searches reasonable if consented to by the person in lawful possession of the articles seized, or the premises on which they are found, as where the defendant's partner consented to a search, where an office manager in sole control of the office and the corporate records consented to the search and seizure, where the owner-occupant of a house consented to search of the living room in which the defendant customarily slept on a couch, where the wife of the defendant consented to a search of their home, and where an owner consented to a search of his garage and the

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[11] Officers were first drawn to the attention of the vehicle when the friend's mother-in-law called police and stated there was a stolen rifle in the back seat of the car. Officers obtained a warrant to search the vehicle, but because the friend was so cooperative in the stop, they never showed the warrant.

article seized, which had been stored there by the defendant, was not packaged or otherwise concealed. These decisions do not furnish particularly helpful guides to the answer to the precise question raised here, namely, whether the bailor's constitutional immunities were violated in the search consented to by his bailee.

The appellant mistakenly contends that the recent case of *Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961), supports him. That case is not analogous to this, for here consent was given by the bailee in actual lawful possession of the car, and it is the bailor who claims that his constitutional rights were violated by the search. If Chapman sheds any light whatever on the question that concerns us here, it is possibly in the indication it gives that authorization of the search may come from a person in actual lawful possession, and that his rights may not be waived by an owner who has the right to reclaim possession, but has not done so.

[The friends] right to possession of the vehicle was less formal or durable than that of the tenant Chapman to occupancy of the house under his lease. Still, for the time being [the friend] was clothed with rightful possession and control and could do in respect to the automobile whatever was reasonable and not inconsistent with its entrustment to him. No restriction was imposed on him except to return with the car by a certain hour. Although the defendant knew of the presence of the stolen radios in the trunk, he apparently did not think it worthwhile to take the precaution of forbidding his bailee to open the trunk or permit anyone to look into it. He reserved no exclusive right of privacy in respect to the trunk when he delivered the key. In responding as he did to the police, [the friend] did not exceed the authority [the defendant] had seemingly given him. Using the key to open the trunk was not an unwarranted exercise of dominion during the period of his permissive possession and use. Access to

the trunk is a normal incident to the use of an automobile. And if, when he voluntarily opened the trunk, [the friend] did not exceed proper bounds because he had to that extent at least concurrent rights therein with [the defendant], was the ensuing search by the police unreasonable? We think not.

Had the police done more than look with [the friend's] consent into the trunk and observe what was readily visible and not covered over or concealed in package or wrapper-if, for example, they had explored under the floor carpeting or behind the upholstery-we might have a different case. *United States v. Lefkowitz*, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877 (1932); *United States v. Kirschenblatt*, 16 F.2d 202, 203, 51 A.L.R. 416 (2d Cir.1926). There is no suggestion that [the friend] obtained possession of the car with any deceptive purpose against [the defendant] or in collusion with the officers. *Eldridge*, 302 F.2d at 465-466 (emphasis added).

In *State v. Farrell*, 443 A.2d 438 (R.I.1982), the Rhode Island Supreme Court was presented with facts that are very similar to the facts of the case at bar. In Farrell, the defendant left a vehicle at a local garage, having authorized repairs to a dent on the left front fender of the car. A stolen vehicle investigation led police to the garage where defendant had dropped off his vehicle. An examination of the vehicle identification number of the defendant's vehicle revealed that the vehicle was stolen. At this point, an officer asked the owner of the garage for permission to tow the car to the police station. After some discussion, the owner of the garage consented. The trial court rejected the defendant's contention that the owner of the garage had no authority to consent to the car being impounded. The appellate court held that the trial court should have granted the motion for suppression, explaining:

The doctrine that recognizes the validity of third party consent to a search must be applied cautiously to prevent erosion of the Fourth Amendment protections. This is espe-

cially true because consent eliminates the requirement of probable cause. As the Supreme Court in *Stoner v. California*, [376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964)] *supra*, stated:

> "Our decisions make clear that the rights protected by the fourth amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" *Id.* at 488, 84 S.Ct. at 892, 11 L.Ed.2d at 860.
>
> We hold that one who entrusts his automobile to another for the purposes of repair, or periodic inspection as required by law, does not confer the kind of mutual use or control which would empower that person to consent to a warrantless search and seizure. In view of our finding of no consent, coupled with the failure of the state to justify the warrantless seizure on any other ground, the evidence obtained by the police as a result of the seizures is inadmissible and should have been suppressed. The defendant is entitled to a new trial.

Farrell, 443 A.2d at 442. We agree with that analysis.

In the case at bar, the bailment of appellant's vehicle was for the limited purpose of replacing the fuel pump. In order to replace the fuel pump, mechanics needed to access areas of the car where the secret compartments were located. Appellant never explicitly restricted access to those areas of the vehicle. Therefore, once appellant relinquished his keys, he assumed the risk that the mechanics might come across the compartments. Although the dealership acquired common authority over those portions of the vehicle that would be exposed during (1) the process of repairing the vehicle, and (2) the period of time during which the repairs were being made, the dealership was not authorized to consent to a search of the vehicle after the repairs had been completed.

There is a significant difference between (1) authorizing a mechanic to observe what is located in those portions of a vehicle being repaired, and (2) authorizing a mechanic to consent to a law enforcement officer's request for permission to conduct a post-repair examination of those portions of the vehicle that are no longer clearly visible. When Sergeant Lewis and Detective Wentland arrived at the dealership, the authorized repairs to appellant's vehicle had been completed, the vehicle had been parked, and was ready to be picked up. A visual examination of the repaired vehicle did not reveal anything suspicious. Although Sergeant Lewis and Detective Wentland had been told that a mechanic noticed something "suspicious" located in the vehicle, that information did not justify a warrantless search of the vehicle involving the unbolting of seats, pulling up carpet, and using screwdrivers to pry open compartments.[12]

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[12] In *Shipman v. State*, 291 Ala. 484, 282 So.2d 700 (1973), several individuals were detained by police after a store owner complained that the individuals were misbehaving. Police observed one individual transfer an object (clearly not a weapon) from his hand into the top of his boot. Police seized the object under the plain view rationale. It turned out that the object contained heroin. The individual was convicted, but the conviction was reversed on the ground that there was no probable cause to believe that the object seized contained contraband. The Supreme Court of Alabama explained:

> The reason for this rule is apparent. If the rule were otherwise, an officer, acting on mere groundless suspicion, could seize anything and everything belonging to an individual which happened to be in plain view on the prospect that on further investigation some of it might prove to have been stolen or to be contraband. It would open the door to unreasonable confiscation of a person's property while a minute examination of it is made in an effort to find something criminal. Such a practice would amount to the "general exploratory search from one object to another until something incriminating at last emerges" which was condemned in *Coolidge v. New Hampshire*, [403 U.S. 443, 91 S.Ct. 2022, 29 L.E.2d 564 (1971)] *supra*. Ex post facto justification of a seizure made on mere groundless suspicion, is totally contrary to the basic tenets of the Fourth Amendment.

Sergeant Lewis and Detective Wentland had the right to (1) remain at the dealership until appellant arrived (or the right to return to the dealership at that time); (2) question appellant about the information they received from the mechanic; and (3) ask appellant for permission to search the vehicle. They did not, however, have the right to make a warrantless re-entry into-and a minute examination of-those portions of the vehicle that were no longer clearly visible.[13] For these reasons, the "fruit of the poisonous tree" doctrine is applicable to the October 29, 1999 search, and the information obtained by Sergeant Lewis as a result of that search cannot be used in any way to establish probable cause for the July 13, 2000 search.[14]

Shipman, 291 Ala. at 488, 282 So.2d 700. This Court expressly approved of that analysis in *Dixon v. State*, 23 Md. App. 19, 32-33, 327 A.2d 516 (1974).

[13] If Officer Wentland and Sergeant Lewis had been called to the dealership at a point in time when (1) the vehicle was in the process of being repaired, and (2) the suspicious compartments were clearly visible, the "fruit of the poisonous tree" doctrine would not require suppression of information they obtained by observing whatever the mechanic was able to observe at that point in time. Third party consensual searches, however, are limited to items that are clearly visible. *United States v. Block*, 590 F.2d 535, 541 (4th Cir.1978). Therefore, had those circumstances been present in the case at bar, the "fruit of the poisonous tree" doctrine would operate to exclude only information acquired by the officers during an examination of those portions of the vehicle (1) that were not clearly visible, and (2) that the mechanic would not examine in the process of completing the work that the owner had authorized.

[14] The "fruit of the poisonous tree" doctrine does not operate to exclude whatever information was received by Sergeant Lewis before he began to search the vehicle. "[T]he exclusionary rule as to evidence seized in violation of the Fourth Amendment comes into play only when the evidence is obtained by governmental action." *Herbert v. State*, 10 Md.App. 279, 284, 269 A.2d 430 (1970). In the case at bar, however, the non-clearly erroneous findings of fact made by the circuit court do not permit us to conclude as a matter of law that the July 13, 2000 search can be upheld by (1) excluding the fruits of the search conducted by Sergeant Lewis and

II.

In *Ferris v. State*, 355 Md. 356, 735 A.2d 491 (1999), appellant was stopped by an officer because he was traveling faster than the posted speed limit. The officer issued appellant a citation for speeding. Before allowing appellant to go on his way, the officer asked appellant to exit his vehicle so he could ask him a few questions. It was during this questioning that appellant eventually admitted that the vehicle he was driving contained marijuana. At a pretrial hearing, appellant moved to suppress all evidence and statements illegally obtained by the officers. The trial court denied his motion and appellant was convicted of speeding and possession of marijuana. This Court affirmed. The Court of Appeals reversed, explaining:

> The Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention. *United States v. Mendenhall*, 446 U.S. 544, 551, 100 S.Ct. 1870, 1875, 64 L.Ed.2d 497 (1980). The Supreme Court has made clear that a traffic stop involving a motorist is a detention which implicates the Fourth Amendment. See *United States v. Sharpe*, 470 U.S.

675, 682, 105 S.Ct. 1568, 1573, 84 L.Ed.2d 605 (1985); *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317 (1984) (analogizing the degree of intrusiveness of the usual traffic stop to the degree of restraint imposed by the typical Terry stop). It is equally clear, however, that ordinarily such a stop does not initially violate the federal Constitution if the police have probable cause to believe that the driver has committed a traffic violation. *Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772,

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Detective Wentland on October 29, 1999, and (2) combining the observations made by Sergeant Lewis on July 13, 2000 with the information received by Sergeant Lewis before he searched the vehicle on October 29, 1999.

135 L.Ed.2d 89 (1996). Nonetheless, the Supreme Court has also made it clear that the detention of a person "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983) (plurality opinion).

It is without dispute that the stop of Ferris by Trooper Smith for exceeding the posted speed limit constituted a seizure for Fourth Amendment purposes, but that such a seizure was justified by the probable cause possessed by the trooper in having witnessed Ferris's traffic violation. Indeed, Ferris does not contest the initial stop. The real issue lies in the actions taken by the officer after he had issued the speeding citation to Petitioner and had returned his driver's license and registration to him.

* * *

[T]he officer's purpose in an ordinary traffic stop is to enforce the laws of the roadway, and ordinarily to investigate the manner of driving with the intent to issue a citation or warning. Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention. *See Royer*, 460 U.S. at 500, 103 S.Ct. at 1325-26. Thus, once the underlying basis for the initial traffic stop has concluded, a police-driver encounter which implicates the Fourth Amendment is constitutionally permissible only if either (1) the driver consents to the continuing intrusion or (2) the officer has, at a minimum, a reasonable, articulable suspicion that criminal activity is afoot. *United States v. Sandoval*, 29 F.3d 537, 540 (10th Cir.1994).

* * *

When, as here, the purpose for which the investigatory stop was instituted has been accomplished and no other reasonable suspicion exists to support further investigation, there is no

justification for continued detention and interrogation of citizens. *People v. Redinger*, 906 P.2d 81, 85-86 (1995) (*en banc*) (footnote omitted). See *United States v. Soto-Cervantes*, 138 F.3d 1319, 1322 (10th Cir.1998), *cert. denied*, 525 U.S. 853, 119 S.Ct. 131, 142 L.Ed.2d 106 (1998); *Karnes v. Skrutski*, 62 F.3d 485, 491 (3rd Cir. 1995); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir.1994); *United States v. Obasa*, 15 F.3d 603, 607 (6th Cir.1994); *People v. Rodriguez*, 945 P.2d 1351, 1360 (Colo.1997) (*en banc*); *Commonwealth v. Torres*, 424 Mass. 153, 674 N.E.2d 638, 642 (Mass.1997). *See also Berkemer*, 468 U.S. at 439-40, 104 S.Ct. at 3150 ("Unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released") (footnotes omitted); *Davis v. State*, 947 S.W.2d 240, 243 (Tex.Crim. App.1997) (*en banc*) ("Once the reason for the stop has been satisfied, the stop may not be used as a 'fishing expedition for unrelated criminal activity.'" *quoting Ohio v. Robinette*, 519 U.S. 33, 117 S.Ct. 417, 422, 136 L.Ed.2d 347 (1996) (*Robinette II*) (Ginsburg, J., concurring)). Many of these cases employing careful scrutiny if not skepticism over continued detentions in the context of traffic stops are consistent with the admonition of *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and its progeny that Terry stop must not only be justified at its inception, but its scope throughout must be reasonably related to the circumstances which justify the intrusion. *United States v. Babwah*, 972 F.2d 30, 33 (2nd Cir. 1992).

We conclude, after considering all the circumstances of the initial encounter between Trooper Smith and Petitioner, that the traffic stop essentially came to an end upon the trooper's delivery of the citation, and return of the driver's license and registration. Once Ferris signed and returned the citation in compliance with Maryland traffic laws, Maryland Code (1977, 1999 Repl.Vol.), § 26-203 of the Transportation Article, he had completed all his duties pertaining to the traffic stop itself. Because the traffic stop had ended there, Ferris was

lawfully free to drive away, as Trooper Smith himself acknowledged in his own testimony. *Ferris*, 355 Md. at 369-373, 735 A.2d 491. (Emphasis added).

In the case at bar, appellant argues that Sergeant Lewis lacked reasonable, articulable suspicion to continue to detain appellant after the initial purpose of the traffic stop was complete.[15] The circuit court opined that, when several factors it identified were considered as a whole, Sergeant Lewis did have reasonable and articulable suspicion to detain appellant after the purpose of the initial traffic stop was over.[16] For reasons stated above, Sergeant Lewis' knowledge of the two compartments in appellant's vehicle cannot be used to estab-

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[15] In *United States v. Arvizu*, 534 U.S. 266, 273, 274, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002), the United States Supreme Court again emphasized that suppression hearing courts must examine the "totality of the circumstances" when making a "reasonable suspicion" determination:

> When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing. This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that "might well elude an untrained person." Although an officer's reliance on a mere "hunch" is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.

[16] Those observations included: (1) a strong odor of air fresheners; (2) appellant seemed extremely nervous in that his carotid pulse was pounding and he did not make eye contact; (3) appellant produced a large wad of money from his pocket as he retrieved his license and registration; (4) the car was very clean; (5) the windshield was affixed with police stickers; (6) Sergeant Lewis's prior knowledge of the secret compartments in the vehicle; (7) Sergeant Lewis smelled the definite odor of cocaine emanating from the vehicle; and (8) Sergeant Lewis's knowledge that appellant was a suspected drug dealer.

lish either reasonable articulable suspicion to detain appellant or probable cause to search appellant's vehicle. It is true that Sergeant Lewis testified that he smelled the "definitive odor of cocaine," and that testimony-if accepted as true-would have established probable cause for both an arrest and a search. The circuit court, however, expressly rejected that testimony.[17] We must therefore examine the remaining factors to determine whether there existed probable cause for the warrantless search of appellant's vehicle.

Appellant Seemed Nervous

Sergeant Lewis testified that appellant seemed extremely nervous, which indicated that there could be criminal activity afoot. In Ferris, supra, the Court of Appeals stated:

> "The nervousness, or lack of it, of the driver pulled over by a Maryland State trooper is not sufficient to form the basis of police suspicion that the driver is engaged in the illegal transportation of drugs. There is no earthly way that a police officer can distinguish the nervousness of an ordinary citizen under such circumstances from the nervousness of a criminal who traffics in narcotics. An individual's physiological reaction to a proposed intrusion into his or her privacy cannot establish probable cause or even grounds to suspect. Permitting [a] citizen's nervousness to be the basis for a finding of probable

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[17] In finding that "Sergeant Lewis and Detective Wentland moved the seat and lifted the carpeting to view what was ultimately determined to be the concealed compartments," the circuit court also rejected Sergeant Lewis' testimony that it was an employee of the dealership rather than a law enforcement officer who "pulled [the seat] back" to "show me what they had found which prompted them to call the police." Because that testimony was rejected, and the record contains no other evidence of what was actually told to the law enforcement officers before they began searching the vehicle, we are unable to conclude that the July 13, 2000 search can be justified on the basis of (1) the observations made by Sergeant Lewis on that date, and (2) the information provided to Sergeant Lewis on October 29, 1999.

> cause would confer upon the police a degree of discretion not grounded in police expertise, and, moreover, would be totally insusceptible to judicial review. . . ."

Id. at 388, 735 A.2d 491 (quoting *Whitehead v. State*, 116 Md.App. 497, 698 A.2d 1115, *cert. denied* (1997)). The trial court gave more weight to Sergeant Lewis' determination that appellant was "extremely nervous" than Ferris permits. We take judicial notice that it is more likely so than not so that, when a uniformed law enforcement officer stops a motorist for speeding, the motorist will exhibit signs of nervousness. We reject the proposition that law enforcement officers are entitled to detain a motorist on the ground that the motorist fails to make "eye contact" and/or the motorist's "carotid pulse" is "pounding."

Smell of Air Fresheners

In *Snow v. State*, 84 Md.App. 243 261 578 A.2d 816 (1990), this Court stated that "[a]ir fresheners are, as far as we know, a completely legitimate object; some are, undoubtedly, thought to be ornamental as well as functional." Although air fresheners may give rise to a "hunch," they simply do not constitute a reasonable articulable suspicion. *Charity v. State*, 132 Md.App. 598, 639, 753 A.2d 556 (2000).

We recognize that in *Nathan v. State*, 370 Md. 648, 805 A.2d 1086 (2002), the Court of Appeals noted that the presence of an "overwhelming" odor of an air freshener can be included in the combination of factors that justify an investigative detention. That case, however, does not hold that the odor of an air freshener "taken together" with the motorist's nervousness are sufficient grounds to justify an investigative detention. In *Nathan*, while checking for license and registration, the officer also observed that (1) the van's ceiling appeared new and lower than normal; (2) the van's occupants seemed very nervous and provided inconsistent stories about their trip; and (3) Nathan was unable to produce identification. The Court of Appeals stated:

> The fact that Nathan, the driver was unable to produce identification, in combination with Sgt. Lewis' observations of Nathan and Shaw's extreme nervousness, Shaw's apparent pretense of sleep when the vehicle was initially stopped, Nathan's evasive answers regarding his travel plans, the in-consistent versions of the trip itinerary and purpose provided by Nathan and Shaw, the "overwhelming" odor of air freshener, and the altered ceiling that led the officer to believe that the van had a hidden compartment, as well as the police observations prior to the traffic stop (the passenger's head bobbing up and down in the rear window), were sufficient grounds, taken together, reasonably to warrant an investigative detention. *Id.* at 664-665, 805 A.2d 1086 (footnotes omitted) (citations omitted). In the case at bar, because (1) the "fruit of the poisonous tree" doctrine applies to Sergeant Lewis' knowledge that there were hidden compartments in appellant's vehicle, (2) there was nothing "evasive" about appellant's answers to any question, and (3) appellant produced a valid driver's license and registration, we conclude that Nathan requires a reversal of appellant's convictions.

Additional Factors

The remaining factors-a clean car, the "wad" of money, police stickers, and the fact that appellant was "under investigation" by the Wicomico Drug Task Force-simply do not add up to justify the July 13, 2000 warrantless search of appellant's automobile. Once the information obtained during the October 29, 1999 search is redacted from the probable cause equation, it is clear that appellant's motion for suppression should have been granted.

JUDGMENTS REVERSED; COST TO BE PAID BY ANNE ARUNDEL COUNTY.

Md.App., 2003. *Seldon v. State*, 151 Md.App. 204, 824 A.2d 999

APPENDIX G

PERTINENT PROVISIONS

U.S. Const. Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

18 U.S.C. § 1957

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that

the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are—

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General.

(f) As used in this section--

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction

under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed April 18, 2007]

No. 04-4473 CR-03-93-JFM

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

RONALD LAMONT SELDON, a/k/a Pee Wee
Defendant-Appellant

MANDATE

The judgment of this Court, entered 3/15/07, takes effect this date.

A certified copy of this Court's judgment and a copy of its decision are issued to the district court and constitute the mandate of this Court.

/s/ Patricia S. Connor
CLERK